

People v Schuster

2020 NY Slip Op 35588(U)

November 16, 2020

County Court, Westchester County

Docket Number: Ind. No. 20-0144

Judge: David S. Zuckerman

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TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

ROBERT SCHUSTER,

Ind. No.: 20-0144

Defendant.

-----X

ZUCKERMAN, J.

Defendant stands accused under Indictment No. 20-0144 of two counts of Aggravated Vehicular Homicide (Penal Law §125.14[3]), two counts of Vehicular Manslaughter in the First Degree (Penal Law §125.13[3]), Manslaughter in the Second Degree (Penal Law §125.15[1]), two counts of Driving While Intoxicated (one each under Vehicle and Traffic Law §1192[2] and §1192[3]), and Reckless Driving (Vehicle and Traffic Law §1212)). As set forth in the Indictment, it is alleged that, on or about December 16, 2019, Defendant, in Westchester County, New York, operated a motor vehicle while in violation of Vehicle and Traffic Law §1192[2] and §1192[3], recklessly and in a manner which unreasonable endangered users of the public highway, and caused the death of another; operated said motor vehicle while intoxicated, and with a blood/alcohol level exceeding .18%. By Notice of Motion dated October 9, 2020, with accompanying Affirmation, Defendant moves for omnibus relief. In response, the People have submitted an Affirmation in Opposition dated November 6, 2020, and Defendant a Reply on November 12, 2020.

The motion is disposed of as follows:

A. DISCOVERY AND INSPECTION

Discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People. 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, if they have not already done so. The People's 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. Further, the bill of particulars set forth in the voluntary disclosure form provided to Defendant has adequately informed Defendant of the substance of alleged conduct and in all respects complies with CPL Article 245 and §200.95.

In addition, pursuant to Administrative Order 393/19, it is **ORDERED** that the District Attorney and the Assistant District Attorney responsible for the case, are required to make timely disclosure of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]; *People v Geaslen*, 54 NY2d 510 [1981]; and their progeny under the United States and New York State Constitutions and by

Rule 3.8(b) of the New York State Rules of Professional Conduct; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representatives, have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and are therefore expected to confer with investigative and prosecutorial personnel who acted in the case and to review all files which are directly related to the prosecution or investigation of this case. For purposes of this Order, favorable information can include but is not limited to:

a) Information that impeaches the credibility of a testifying prosecution witness, including (i) benefits, promises, or inducements, express or tacit, made to a witness by a law enforcement official or law enforcement victim services agency in connection with giving testimony or cooperating in the case; (ii) a witness's prior inconsistent statements, written or oral; (iii) a witness's prior convictions and uncharged criminal conduct; (iv) information that tends to show that a witness has a motive to lie to inculcate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution; and (v) information that tends to show impairment of a witness's ability to perceive, recall, or recount relevant events, including impairment resulting

from mental or physical illness or substance abuse;

b) Information that tends to exculpate, reduce the degree of an offense, or support a potential defense to a charged offense;

c) Information that tends to mitigate the degree of the defendant's culpability as to a charged offense. or to mitigate punishment;

d) Information that tends to undermine evidence of the defendant's identity as a perpetrator of a charged crime, such as a non-identification of the defendant by a witness to a charged crime or an identification or other evidence implicating another person in a manner that tends to cast doubt on the defendant's guilt; and

e) Information that could affect in the defendant's favor the ultimate decision on a suppression motion; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent prosecuting the case is hereby advised of his/her duty to disclose favorable information whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is directed that favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL

Article 240. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL sections 240.44 or 240.45[1]. Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is hereby reminded and informed that his/her obligation to disclose is a continuing one; and it is further

ORDERED, notwithstanding the foregoing, that a prosecutor may apply for a protective order, which may be issued for good cause, and CPL Section 240.50 shall be deemed to apply, with respect to disclosures required under this Order. Moreover, the prosecutor may request a ruling from the court on the need for disclosure. Only willful and deliberate conduct will constitute a violation of this Order or be eligible to result in personal sanctions against a prosecutor; and it is further

ORDERED, that counsel for the defendant is required to:

a) confer with the defendant about his/her case and is required to keep the defendant informed about all significant

developments in the case; and

b) timely communicate any and all plea offers to the defendant and to provide him/her with reasonable advice about the advantages and disadvantages of any such plea offer including the potential sentencing ranges that apply in the case;

c) where applicable, insure the defendant receives competent advice concerning immigration consequences as required under *Padilla v Kentucky*, 559 US 356 [2010];

d) perform a reasonable investigation of the facts and the law pertinent to the case (including, as applicable, visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts; inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.) or, as appropriate, making a reasonable professional judgment not to investigate a particular matter;

e) comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;

f) possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and

g) in accordance with statute, provide notices as specified in CPL sections 250.10, 250.20 and 250.30. (e.g., a demand, intent to introduce the evidence, etc.)

B. MOTION FOR A HUNTLEY/DUNAWAY HEARING

Defendant moves, pursuant to CPL §710.20(3), to suppress noticed statements alleging, *inter alia*, that they were made after a seizure that was not based on probable cause. The People, in their Affirmation in Opposition, state that there was no impropriety in obtaining the statements attributable to Defendant and that the statements were made after an arrest which was based on probable cause. They do, however, consent to a hearing on the issue. Consequently, the motion to suppress noticed statements is granted to the extent that a *Huntley/Dunaway* hearing is ordered to determine the voluntariness of same.

C. MOTION FOR A WADE HEARING

A review of the Indictment and attached Notices indicates that, pursuant to CPL §710.20(3), the People served notice of identification procedures. Defendant asserts that there were constitutional improprieties in the identification procedures employed. The People argue that there were no improprieties in the instant identification procedures, namely the showing of a single photograph of Defendant to afford witnesses who already knew and were familiar with him an opportunity to identify him and describe his actions and demeanor, because they were confirmatory in nature and not identification procedures. Consequently, a hearing is ordered to consider whether such witness' proposed in-court identifications were based upon prior familiar with each other. In the event the parties are found not to have had sufficient prior

familiarity with each other, the hearing shall go on to determine whether the photographic displays were unduly suggestive in nature.

D. MOTION TO SUPPRESS PHYSICAL EVIDENCE/FOR A MAPP HEARING/TO SUPPRESS THE RESULTS OF HIS BLOOD TEST

Defendant moves, pursuant to CPL §710.20(3), to suppress any physical evidence which the People intend to introduce at trial. The People, in their Affirmation in Opposition, state that there was no impropriety in the search conducted and, in fact, that no physical evidence was seized except pursuant to validly issued search warrants. The results of searches conducted pursuant to lawful search or arrest warrants, however, are not subject to a suppression hearing. *People v. Arnau*, 58 NY2d 27 (1982). Therefore, Defendant's motion to suppress the fruits of the search is denied.

Defendant also moves to controvert the underlying search warrants. The court has reviewed the affidavit in support of the search warrants and finds that it provided the issuing magistrate with ample probable cause to support issuance same. Neither is there any evidence that the affidavit includes false statements, that the affiant knowingly included false and misleading statements in the affirmation, or that the application was made with reckless disregard for the truth. *People v Kelly*, 151 AD3d 751 (2nd Dept 2017); *People v Rhodes*, 49 AD3d 668 (2nd Dept 2008). Further, this court reviewed the search orders and finds them to be proper in all respects. This court notes that according to the Voluntary Disclosure Form and People's Affirmations filed in this case, the

People have provided defense counsel with access to the search warrants.

Defendant also seeks to controvert the warrants based on what he asserts is the failure to obtain the warrants from a neutral and detached magistrate: Hon. George E. Fufidio, Jr. *People v Bilsky*, 95 NY2d 172 (2000). Defendant essentially asserts three grounds for invalidating the warrants based on the issuing court's alleged conflicts: that a witness who provided information in support of the warrants to the officer/applicant was represented by Judge Fufidio's former law partner; that Judge Fufidio's law clerk had prosecuted Defendant; and that the People chose to apply to Judge Fufidio for the instant warrants in derogation of established procedure. As the People properly note, there is no proof that the witness was, in fact, represented by Judge Fufidio's former law partner at the time of the application, much less that the court knew of such representation. Indeed, the witness never interacted with police investigators or the People while assisted by counsel. Likewise, there is no evidence that Judge Fufidio, knew at the time of the application, that his law clerk had previously prosecuted Defendant, approximately seven years ago, for driving while intoxicated.

In any event, as the People properly argue, Judiciary Law §14 requires recusal when a judge is a party to an action, has been an attorney in an action, has an interest in an action, or is related to any party in an action. Even if a search warrant application

were deemed an action, Judge Fufidio fits none of those categories. If recusal is not mandated by Judiciary Law §14, then recusal is voluntary. *People v Grosse*, 172 AD3d 1092 (2nd Dept 2019); see also *People v Moreno*, 70 NY2d 403, 406 (recusal not required by past association with law firm employed by party, nor prior prosecution of Defendant). When Judge Fufidio discovered that a witness relied on in the warrant application was represented by his former law partner, and/or that his law clerk had previously prosecuted Defendant in a Driving While Intoxicated matter, he voluntarily recused to avoid the appearance of impropriety. As the People also correctly assert, such a recusal does not compromise the validity of prior proceedings without a showing of actual bias or impropriety by the judge. *People v Joseph*, 167 AD3d 776 (2nd Dept 2018). Defendant has demonstrated neither.

Finally, Defendant also argues that the People in effect "forum shopped," choosing to take their warrant application to Judge Fufidio. As the People correctly argue, and as the court also takes judicial notice, Judge Fufidio was the duty judge on the date that the application was made. In effect, he was assigned at random to hear and determine all emergency applications by any party on that date and a number of dates before and after. As such, there was no "forum shopping" by the People; their forum-- Judge fufidio--had been previously set by the Supervising Judge, and they essentially had no choice but to make their application to him. Thus, for all of the above reasons, Defendant's motion to

controvert the warrants, including for their having been signed by someone who was not a detached and neutral magistrate, is denied in all respects.

**E. MOTION TO INSPECT 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. Further, Defendant has requested that the court examine the use of "redactions" during the presentation of evidence. A review of the minutes reveals that some evidence was marked for identification, and thereafter redacted copies of said exhibits were moved into evidence. The People then charged the Grand Jury not to speculate as to the reason why there were redactions to the documents. The court finds no prejudice to Defendant from the People's marking, but not introduction, of items, and thereafter the introduction of redactions of such exhibits, particularly when accompanied immediately thereafter by a caution not to speculate as to the reason for the redactions.

Finally, Defendant urges this court to insure that exculpatory evidence in the hands of the prosecution was introduced to the Grand Jury. A review of the minutes reveals that, on several occasions, police or EMT witness were asked by the People whether Defendant exhibited any indicia of intoxication, including whether any of them detected the odor of alcohol on his breath, and all were permitted to testify that they did not. Witnesses were also asked whether they spoke to defendant about whether he had consumed any alcohol and the witnesses stated that Defendant denied

consuming alcohol. These witnesses were further asked if Defendant was appropriately responsive to questions and they stated that he was.

Further, the People's Bedford Police Department accident reconstruction expert provided his opinion that, immediately prior to the accident, Defendant was driving up a 5% grade and into a blind curve, which would have limited his ability to see an approaching vehicle. This expert was also asked his opinion as to whether the damage to Defendant's vehicle was indicative of anything regarding the angle and/or direction of impact of the vehicles, and he was allowed to testify that it was his opinion that it was consistent with Defendant swerving to avoid the oncoming vehicle operated by the deceased. The People's Westchester County Department of Public Safety accident reconstruction expert also supported this opinion, by his own opinion, based on the data from the vehicle's crash data retrieval report, that Defendant turned the wheel in excess of 90 degrees to the right at the last one-half second before the accident. Finally, at the close of the presentation, the People offered to the Grand Jury the opportunity to hear from a witness put forth by Defendant, fairly recounting the testimony which the witness proposed to provide. The Grand Jury voted not to consider that proffered testimony. Accordingly, Defendant's motion to dismiss or reduce for a failure of the People to present exculpatory evidence in their possession is likewise 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]), 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.

F. 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:

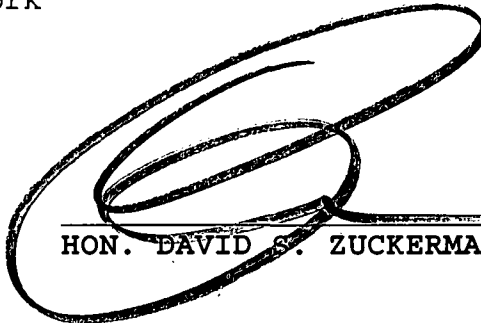
A. Pursuant to CPL §245.20, the People must notify the Defendant, not less than fifteen days prior to the first scheduled date for trial, of all specific instances of Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for 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

B. Defendant, at the ordered hearing, must then sustain the burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in her own behalf (*see, People v. Malphurs*, 111 AD2d 266 [2nd Dept. 1985]).

All other motions are denied.

Dated: White Plains, New York
November 16, 2020



HON. DAVID S. ZUCKERMAN, A.J.S.C.

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