People v Paucar
2020 NY Slip Op 35616(U)
November 16, 2020
County Court, Westchester County
Docket Number: Ind. No. 20-0263
Judge: Anne E. Minihan
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WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X
THE PEOPLE OF THE STATE OF NEW YORK

FILED
NOV 17 2020
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

-against-

DECISION & ORDER
Ind No.: 20-0263

JAIME PAUCAR,

Defendant.
---X
MINIHAN, J.

Defendant, Jaime Paucar, charged by Westchester County Indictment No. 20-0263, with Murder in the Second Degree (Penal Law § 125.25 [2]) (two counts), Aggravated Vehicular Homicide (Penal Law § 125.14[1]), Aggravated Vehicular Homicide (Penal Law § 125.14[4]) (two counts), Manslaughter in the Second Degree (Penal Law § 125.15[1]) (two counts), Assault in the Second Degree (Penal Law § 120.05[4]), Assault in the Third Degree (Penal Law § 120.00[2]), Aggravated Driving While Intoxicated (VTL § 1192[2-a]), Driving While Intoxicated, Per Se, as a Misdemeanor (VTL § 1192[2]), Driving While Intoxicated, as a Misdemeanor (VTL § 1192[3]), Reckless Driving (VTL § 1212); Leaving the Scene of an Incident Without Reporting, Property Damage (VTL § 600.00[1A]), Leaving the Scene of an Incident Without Reporting, Personal Injury (VTL§ 600.00[2A]), has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and exhibits. In response thereto, the People have filed an Affirmation in Opposition together with a Memorandum of Law.

I.

MOTION to INSPECT, DISMISS and/or REDUCE
CPL ARTICLE 190

Defendant moves for the court to inspect the grand jury minutes and, if the court finds it necessary, to release the minutes of the prosecutor's instructions. In opposition, the People argue that, upon inspection of the minutes, the court will find that no reason exists for their release and that, thus, the secrecy provisions of CPL 190.25(4) should prevail. The People point out that, as required, they provided defendant with a transcript of the grand jury evidence (CPL 245.20[1][b]). Upon review of the grand jury minutes, the court declines to release to the defendant the prosecutor's instructions, finding that the prosecutor properly instructed the grand jury on the law (*see People v Valles*, 62 NY2d 36 [1984]).

Defendant moves to dismiss counts 1 and 2 of the indictment, charging murder in the second degree, on the basis that the evidence presented to the grand jury was legally insufficient to show that defendant acted with depraved indifference to human life at the time of the accident. Defendant argues that *People v Valencia* (14 NY3d 927 [2010]) and *People v Prindle* (16 NY3d 768 [2011]) are dispositive in this case. In particular, defendant argues that since *People v Valencia* (14 NY3d 927) presented facts nearly identical to those herein and the court there held that no trier of fact could reasonably find depraved indifference, this court should dismiss the depraved indifference murder charges for legally insufficient evidence. Defendant also cites to the PJI for depraved indifference murder and argues that the facts herein do not meet that definition because the People cannot establish that defendant possessed a wicked, evil, or inhumane state of mind. Moreover, defendant argues that the level of intoxication alleged by the prosecutors negates the culpable mental state of depraved indifference (*citing People v Wimes*, 49 AD3d 1286, 1287 [4th Dept 2008]; *People v Coon*, 34 AD3d 869, 870 [3d Dept 2006]). To distinguish the present case from *People v Heidgen* (87 AD3d 1014 [2d Dept 2011], *aff'd* 22 NY3d 259 [2013]), defendant argues that, unlike in that case, his alleged statements "don't even come close" to establishing the culpable state of depraved indifference.

The People argue three main points in opposing the dismissal of the murder counts. First, they argue that defendant is mistakenly relying on the "beyond a reasonable doubt" standard of proof required for a conviction at trial, not the lesser "competent proof" standard required for legal sufficiency at the grand jury stage. Second, the People argue that the facts herein are more akin to *People v Heidgen* (22 NY3d 259) than *People v Valencia* (14 NY3d 927) because unlike in *Valencia* where the defendant was convicted "based simply on his earlier acts of drinking to the point of extreme intoxication despite [his] awareness that he would be driving in that condition later that evening," (*Heidgen*, 22 NY3d at 275) in the present case, as in *Heidgen*, the evidence establishes that defendant's *mens rea* was formed when he continued to travel the wrong way and tracked other vehicles that were traveling in the correct direction and trying to get out of his way. Third, the People argue that whether a defendant acts with depraved indifference and whether, as defendant argues, voluntary intoxication negates any formation of a mental state for murder, is highly fact specific and that, here, the grand jury proof, viewed in the light most favorable to the prosecution, shows from defendant's pattern of driving, including tracking oncoming cars, hitting some and narrowly avoiding others while maintaining his speed, his statements to the police, his BAC levels, and the witness observations of his driving before he entered 287 the wrong way, provided legally sufficient evidence that defendant drove with depraved indifference to human life.

The court agrees with the People that dismissal of the murder counts is not warranted. Depraved indifference is a distinct culpable mental state consisting of "an utter disregard for the value of human life - - a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not" (*People v Feingold*, 7 NY3d 288, 296 [2006]). Whether a case presents behavior evincing depraved indifference is "highly fact-specific and dependent upon the individual defendant's particular mental state" (*People v Heidgen*, 22 NY3d at 276). "[I]ntoxicated driving cases in general, although clearly examples of dangerous behavior, are not thought of as 'quintessential' cases of depraved indifference" (*People v Heidgen*, 22 NY3d at 276). Recognizing the importance of properly prosecuting DWI crimes which result in personal injury or death the legislature enacted the aggravated vehicle homicide and assault statutes (Penal Law §§ 125.14, 120.04-a), which provide for enhanced punishment of DWI drivers who cause death or serious injury when, for example, the blood alcohol content is at least .18 (*People v Heidgen*, 22 NY3d at 276). "These statutes, however, do not foreclose the possibility of prosecution for depraved indifference murder where egregious circumstances warrant that charge" (*People v Heidgen*, 22 NY3d at 276-277).

Contrary to the defendant's contention, and in line with the People's reasoning, the court finds that the fact pattern herein is more akin to that in *People v Heidgen* (22 NY3d 259) than in *People v Valencia* (14 NY3d 927) and that, thus, dismissal of the murder charges is not warranted. In *People v Valencia*, "[t]he trial evidence established only that defendant was extremely intoxicated and did not establish that he acted with the culpable mental state of depraved indifference" (14 NY3d at 927-928). The trial judge, as the fact finder, determined that the defendant had been "oblivious" to the risks caused by his drunk driving at the time of the offense. Defendant is correct that many of the facts in *Valencia* are similar to those herein, i.e., both defendants drove a measurable distance at a high rate of speed, the wrong way, at night, while highly intoxicated. However, unlike in *Valencia*, the evidence as to defendant's driving patterns both before and after entering 287 going the wrong way, if accepted as true, could lead a jury to rationally conclude that defendant was not oblivious to but, rather, appreciated the danger of his conduct. As examples of his driving conduct, but not an exhaustive list, defendant was observed to collide with a vehicle, to drive completely around another vehicle, to swerve away from a vehicle, and to drive straight toward a vehicle. Viewed in the light most favorable to the prosecution, the observations as to defendant's driving, if accepted as true, could lead a jury to rationally conclude that defendant "drove, knowing that he was on the wrong side of the road and with an appreciation of the grave risks involved in that behavior" (*see People v Heidgen*, 22 NY3d at 277).

The evidence as to defendant's particular driving pattern renders defendant's reliance on *People v Prindle* (16 NY3d 768 [2011]) misplaced. There, the Court reduced the conviction of depraved indifference murder to manslaughter in the second degree on the basis that the evidence adduced at trial did not support the jury's conclusion that defendant evinced a depraved indifference to human life. In *Prindle* (16 NY3d 768) defendant led police on a high speed chase after trying to steal two snowplows, ultimately smashing his van into another vehicle and killing a passenger therein. "Prindle, although plainly driving in an unsafe manner, had been actively attempting to avoid hitting other vehicles" (*People v Heidgen*, 22 NY3d at 276). Here, in contrast, the grand jury evidence as to defendant's driving pattern, if accepted as true, could lead a jury to rationally conclude that defendant drove knowing and disregarding danger, not actively trying to avoid it.

Based on the caselaw surrounding DWI depraved indifference cases, a murder conviction herein may hinge on whether the jury finds that defendant drove oblivious to, or with an appreciation of, the danger posed, or whether he actively tried to avoid causing harm. As for defendant's argument that the level of intoxication alleged by the prosecutors negates the culpable *mens rea* of depraved indifference, that may ultimately be a question for the fact finder at trial. At this stage, however, the court is faced with only whether the grand jury evidence is legally sufficient, a burden which is significantly less onerous than the burden required for a conviction. "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]). Here, upon the court's review of the grand jury minutes, the court finds that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged (CPL 210.30 [2]). In particular, and contrary to defendant's contention, the grand jury evidence was legally sufficient to establish the murder counts. Accordingly, defendant's motion to dismiss and/or reduce the indictment for lack of sufficient evidence is denied.

II.

MOTION for a *FRYE* HEARING

If the People intend to offer in their case in chief evidence of defendant's blood alcohol content based on a theory of retrograde extrapolation, defendant moves to preclude such evidence or, alternatively, for a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir]). Defendant also requests a hearing to determine if the People can lay a proper foundation for such evidence, citing to *People v O'Connor* (290 AD2d 519, 520 [2d Dept 2002]). In *People v O'Connor* (290 AD2d at 520), the Appellate Division found, in pertinent part, that the Supreme "correctly ruled, after a hearing, that the prosecution's expert on retrograde extrapolation in ascertaining a person's blood alcohol level was qualified and that a proper foundation was laid for his testimony." The People argue that the motion is premature, as it is "one more suitably resolved as an evidentiary question by the trial judge before trial." The People also argue that the motion should be denied because, as the Second Department held in *People v Sharpe* (185 AD3d 965, 966 [2d Dept 2020]), retrograde extrapolation evidence is accepted by the courts of New York State without need for a *Frye* hearing.

The court agrees with the People that a *Frye* hearing is not necessary herein because retrograde extrapolation evidence is accepted by the courts (*see People v Sharpe*, 185 AD3d at 966; *People v Menegan*, 107 AD3d 1166, 1169 [3d Dept 2013]; *People v Dombrowski-Bove,* 300 AD2d 1122, 1123 [4th Dept 2002]). As for defendant's request for a hearing to determine if the People can lay a proper foundation for such evidence, the court denies the motion as premature. As in *Sharpe* (185 AD3d at 966), if the People seek to introduce an expert's testimony as to retrograde extrapolation the People will be required to establish that their expert is sufficiently qualified to render an opinion as to the defendant's blood alcohol content.

III.

MOTION to SUPPRESS UNNOTICED & NOTICED STATEMENTS CPL 710.30(1)(a)

The motion to suppress noticed statements is granted to the extent that, on consent of the People, a *Huntley* hearing shall be held prior to trial to determine whether the noticed statements were 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]) and/or obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]),

Insofar as the motion seeks to dismiss unnoticed statements, it is denied as premature. The People acknowledge their obligations under CPL 710.30.

IV.

MOTION to SUPPRESS PHYSICAL EVIDENCE & to CONTROVERT A SEARCH WARRANT

Defendant moves to suppress any evidence resulting from his arrest on the basis that he was unlawfully arrested without probable cause and moves to suppress any evidence obtained by search warrant on the basis that the supporting affidavits were conclusory and failed to provide probable cause for the warrants.

The branch of the motion which is to controvert the search warrants and to suppress the evidence obtained thereby is denied. The results of a search conducted pursuant to a facially sufficient search warrant are not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). Upon review of the four corners of the search warrant affidavits, the warrants were adequately supported by probable cause (*see People v Keves*, 291 AD2d 571 [2d Dept 2002]; *see generally People v Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v Elysee*, 49 AD3d 33 [2d Dept 2007]).

The motion to suppress evidence not obtained by search warrant is granted solely to the extent of ordering a pre-trial *Mapp* hearing to determine the propriety of any search resulting in the seizure of property (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing will also address whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

V.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Upon the consent of the People, in the event that the People determine that they will seek to introduce evidence at trial of any prior uncharged misconduct and criminal acts of the defendant, including acts sought to be used in their case in chief, they shall so 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 or not any evidence of uncharged crimes may be used by the People, including 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 the other hearings herein.

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]).

VI.

MOTION for a BILL OF PARTICULARS CPL 200.95 & DISCOVERY CPL ARTICLE 245

Defendant demands a bill of particulars pursuant to CPL 200.95. The People are correct that defendant's request for a bill of particulars is untimely, as CPL 200.95(3) requires that a request for a bill of particulars be served upon the prosecution within thirty (30) days after arraignment. Nonetheless, the People are hereby directed to provide a bill of particulars within five days of their receipt of this order (*see* CPL Article 245; CPL 200.95).

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[1] 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 counsel has not been provided, counsel 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.

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. To the extent the People cross-move for reciprocal discovery, it is likewise granted to the extent provided for in CPL Article 245.

[1] 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.

VII.

MOTION for LEAVE to FILE FUTURE MOTIONS

This branch of the motion is denied. Should defendant intend to bring further motions for omnibus relief, he must do so by order to show cause setting forth reasons as to why his motion was not and could not have been brought in conformity with CPL 255.20.

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

Dated: White Plains, New York
November 16, 2020

Honorable Anne E. Minihan
Acting Supreme Court Justice

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