

People v Alexander
2021 NY Slip Op 33607(U)
July 26, 2021
County Court, Broome County
Docket Number: Docket No. 70251-21
Judge: Kevin P. Dooley
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STATE OF NEW YORK
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

CHARLES A. ALEXANDER,
Defendant.

DECISION AND ORDER
Indictment No. 21-157
Docket No. 70251-21

KEVIN P. DOOLEY, J.

On April 22, 2021, a Broome County Grand Jury handed up Indictment No. 21-157, charging the above-named defendant with Burglary in the Third Degree, a class D felony. The indictment alleges that on February 17, 2021, the defendant knowingly entered or remained unlawfully in a building located at 111 Oak Street in the City of Binghamton, with the intent to commit a crime inside.

The defendant was arraigned in Broome County Court on May 6, 2021. On June 21, 2021, the defendant filed with the Court an Omnibus Motion seeking certain Orders and relief in connection with the indictment filed against him. The People's response was filed on July 19, 2021. The following constitutes the Decision and Order of the Court.

GRAND JURY MOTIONS

Motion to Dismiss Indictment as Legally Insufficient – CPL 210.30

The defendant moves for an Order, pursuant to CPL 210.30, for inspection of the stenographic minutes of the grand jury proceeding for the Court to determine whether the evidence before the grand jury was legally sufficient to support the charges contained in the indictment. The People have no objection to the Court examining the grand jury minutes and provided a copy of the same for the Court's review on July 19, 2021. Upon examination of the minutes, the Court finds that release of the minutes to the defense is not necessary to assist the Court in making its determination of the motion. Accordingly, the defendant's request for release of the grand jury minutes for this purpose is denied.

In reviewing the legal sufficiency of the evidence presented, the Court must view the evidence in a light most favorable to the People and determine whether the evidence, if unexplained or uncontradicted, would be sufficient to support a guilty verdict after trial. The

Court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, provide proof of every element of the crimes charged and the defendant's commission of those crimes. Its inquiry does not include weighing the proof or examining its adequacy or determining whether there was reasonable cause to believe the accused committed the crimes charged, as the resolution of such questions is exclusively the province of the grand jury. *People v. Jensen*, 86 NY2d 248 (1995).

Upon examination, the evidence presented to the grand jury was legally sufficient to establish the commission by the defendant of the offense charged in the indictment or lesser included offense thereof. Therefore, the defendant's motion to dismiss the indictment on this ground is denied.

Motion to Dismiss Indictment as Defective – CPL 210.25

The defendant also moves for an Order, pursuant to CPL 210.20 (1) (c), dismissing the indictment on the ground it is as defective within the meaning of CPL 210.35. Defense counsel argues that the integrity of the grand jury proceedings was impaired when certain testimony was elicited from the property manager and Binghamton Police Officer Jonathan Keller relating to their review of the security camera footage. The property manager testified that when he reviewed the footage, he "found the person responsible for taking the packages" and that the person's name was Charles Alexander. Officer Keller testified that when he reviewed the footage, he recognized the person depicted as the defendant because the officer "had several dealings with Charles in the past." The prosecutor admonished the grand jury immediately after the testimony from each witness was elicited, instructing the jury to disregard the property manager's identification of the defendant by name, and to draw no negative inference from any prior "police contact" the defendant had with Officer Keller.

Defense counsel further argues that the integrity of the grand jury proceedings was impaired when the prosecutor notified the grand jury that the defendant intended to testify and then subsequently advised "...as I had told you before, the defendant was wanting to testify before you and give his side of the story. He has actually changed his mind so...and that was actually done moments ago. So, he discussed it with his attorney, and that's why we went out to put that on the record. So, he's not going to be testifying before you today." The prosecutor then advised the grand jury that "I will ask you as a limiting instruction do not take his

unwillingness to now testify into consideration. It is completely the right of a defendant to decide whether or not to testify, and you cannot draw any negative or even positive implications from him not wishing to testify now after he said he wished to.”

The Court may dismiss an indictment pursuant to CPL 210.20 (1) (c), when the grand jury proceeding was defective pursuant to CPL 210.35. Under subdivision (5) of that statute, a grand jury proceeding is defective when the proceeding fails to conform with the requirements of the statutes governing the grand jury to such a degree that the integrity of the proceeding is impaired and prejudice to the defendant may result. Not every improper comment, elicitation of inadmissible testimony, impermissible question or mistake renders an indictment defective. Isolated instances of misconduct will not necessarily impair the integrity of the proceedings or lead to the possibility of prejudice, and the submission of some inadmissible evidence will not be deemed fatal as long as the remaining evidence is sufficient to sustain the indictment. *People v. Huston*, 88 NY2d 400 (1996); *People v. Avant*, 33 NY2d 265 (1973). The exceptional remedy of dismissal is warranted only where a defect in the proceedings creates a possibility of prejudice. Actual prejudice, however, need not be shown, but where prosecutorial wrongdoing, fraudulent conduct, or errors potentially prejudice the ultimate decision reached by the grand jury, the indictment must be dismissed. *People v. Huston, supra*.

The Court does not find that the testimony of the property manager and Officer Keller unduly prejudiced the defendant or impaired the integrity of the proceedings. The property manager’s testimony concerning the defendant’s identity was properly and immediately addressed by the prosecutor. Officer Keller’s testimony concerning his familiarity with the defendant did not impermissibly suggest that the defendant had a prior criminal history and the prosecutor properly instructed the grand jury on the purpose of the officer’s testimony.

The prosecutor’s handling of the defendant’s decision not to testify before the grand jury is, however, troubling. It is prosecutorial misconduct to refer to a defendant’s constitutionally protected right to remain silent and not testify before the grand jury, although the error may be neutralized by a curative instruction or may be harmless under the circumstances of the case. *People v. Scott*, 70 AD2d 601 (2d 1979); *People v. Colban*, 186 AD2d 8 (1st Dept., 1992). The likelihood of prejudice to the defendant depends on the particular facts of the case, including the weight and nature of the admissible proof offered to support the indictment and the degree of

inappropriate prosecutorial influence of bias. *People v. Huston, supra; People v. Tatro*, 53 AD3d 781 (3d Dept., 2008)

The prosecutor could have and should have refrained from notifying the grand jury of the defendant's request to testify until the defendant was present and indicated that he still wanted to testify. Had he done so, there would be no need to provide "limiting instructions" concerning the defendant's subsequent decision not to appear at grand jury. The Court, however, is satisfied that the prosecutor did not deliberately engage in misconduct in connection with the defendant's grand jury appearance, and there was no overall pattern of prosecutorial misconduct during the presentation. *People v. Thompson*, 22 NY3d 687 (2014); *People v. Baptiste*, 160 AD3d 976 (2d Dept., 2018); *People v. Alicea*, 276 AD2d 915 (3d Dept., 2000). Further, given the security camera footage depicting the alleged crime, the identification of the defendant on that footage, and the recovery from the defendant, days later, of a baseball cap and knife similar those depicted on the footage, the prosecutor's clumsy handling of the defendant's aborted appearance before the grand jury did not result in any meaningful prejudice to the defendant and the integrity of the grand jury proceeding was not impaired.

There were no other defects in the grand jury proceedings within the meaning of CPL 210.20 (1) (c). Therefore, the defendant's motion to dismiss the indictment is denied.

MOTIONS FOR DISCOVERY AND OTHER PRE-TRIAL DISCLOSURES

As part of his Omnibus Motion, the defendant moves for an Order directing the prosecutor to provide discovery pursuant to CPL 245 and to strike the certificate of compliance dated February 21, 2020 (*sic*), which was filed by the prosecutor on May 21, 2021. Attached to the prosecutor's certificate of compliance was a nine-page "CPL 245 Disclosure, Pre-Trial Notices and Demands," which the defendant alleges fails to designate the witnesses, police officers and expert witnesses the prosecutor intends to call at trial. For this reason, the defendant argues that the certificate of compliance should be struck.

The prosecutor responds that when he filed his first Certificate of Compliance, he "could not be in possession of the witnesses (he) intended to call at trial" because he was "not aware this case would be set for trial." However, the prosecutor has now filed and served a "Supplemental Certificate of Compliance," dated July 19, 2021, as part of his motion response. Attached to the

supplemental certificate of compliance is a list of “designated witnesses” and “designated evidence” and Compliance Reports for Discovery Package dated May 28, 2021 and July 19, 2021.

The Court notes that CPL 245.10 does not require the disclosure of *ALL* discovery materials before a proper Certificate of Compliance and statement of trial readiness can be filed. *People v. Nelson*, 67 Misc3d 313 (Franklin County Court, 2020). The statute recognizes that discovery is often a continuing process and therefore, provides for on-going disclosures of materials and information during the prosecution of a case. CPL 245.10 (1) grants the prosecution an additional thirty days, beyond the initial fifteen-day period after arraignment, to disclose “exceptionally voluminous” materials as well as materials and information not yet in its possession despite “diligent good faith efforts.” CPL 245.10 (3) requires prosecutors to perform “supplemental discovery obligations” and CPL 245.55 requires prosecutors to ensure the “flow of information” and discoverable materials from law enforcement agencies. CPL 245.60 also imposes a continuing duty on both the prosecutor and defense counsel to disclose additional discoverable materials and information to the opposing party. Finally, CPL 245.50 (1) provides for the filing of a “supplemental certificate of compliance,” identifying any additional discovery provided after the initial certificate is served, and states that “[n]o adverse consequence to the prosecution or prosecutor shall result from the filing of a certificate of compliance in good faith.”

The Court does not accept the prosecutor’s excuse that he was unable to designate the of witnesses, law enforcement officers, and expert witnesses he *intends to call* at trial because he “did not know this case would be set for trial.” The prosecutor’s automatic discovery obligation under CPL 245.20, which includes the designation of the persons and police officers that *may be called as witnesses*, is not triggered only after the case is scheduled for trial. However, the defendant has failed to demonstrate any prejudice as a result of the belated designations made by the prosecutor in his supplemental certificate of compliance. Therefore, the Court denies the defendant’s motion for an Order to strike supplemental certificate of compliance of May 5, 2021.

The defendant also moves for Orders requiring the prosecution to furnish a Bill of Particulars, and to disclose any and all favorable or exculpatory material pursuant to *Brady v. Maryland*, 373 US 83 (1963), and *United States v. Giglio*, 405 US 150 (1972). The prosecutor has provided a response to the defendant’s request for a Bill of Particulars. The prosecutor also acknowledges his obligation under *Brady* and *Giglio* to provide any potentially favorable

information to the defendant, submits that all such information has been disclosed and advises he will provide any additional material to the defendant if and when it becomes available.

If the defendant believes he has not received discovery materials to which he is entitled, he can move for an Order to compel specific disclosure, preclude evidence, or other applicable relief pursuant to CPL 245.35 and 245.80.

REQUESTS AND MOTIONS FOR PRE-TRIAL HEARINGS

Request for Sandoval/Ventimiglia Hearing

The defendant requests that the Court conduct a pre-trial hearing to determine the admissibility of the defendant's prior criminal convictions and/or uncharged criminal conduct at trial, either as part of the People's direct case or for cross-examination of the defendant, should he elect to testify. The prosecutor has no objection to the Court conducting such a hearing and alleges that the defendant has eight prior convictions the prosecutor seeks to use during cross-examination. Therefore, a hearing pursuant to *People v. Sandoval*, 34 NY2d 371 (1974) will be conducted on July 27, 2021, at 1:30 p.m. At the hearing, the prosecutor must set forth both the convictions and any underlying facts he seeks to use during cross-examination, and any uncharged criminal conduct he seeks to introduce in the People's case-in-chief pursuant to *People v. Molineux*, 168 NY 264 (1901).

Motion to Suppress Identification Evidence

The defendant moves for an Order suppressing any trial testimony concerning the "identification" of the defendant by Officer Keller, who recognized the defendant in the copy of the security camera footage of the February 17, 2021, burglary obtained by the Binghamton Police Department and later viewed "prior pictures" of the defendant to confirm that his recognition of the defendant was accurate.

The testimony of Officer Keller concerning his recognition of the defendant on the security camera footage is not subject to suppression pursuant to CPL 710.20 (6), under the circumstances of this case. Rather, assuming the proper foundation is laid, the officer may be permitted to offer "opinion" testimony at trial concerning the identity of the person depicted on the security camera footage. *People v. Sanchez*, 21 NY3d 216 (2013); *People v. Russell*, 79

NY1d 1024 (1992); *People v. Pinkston*, 169 AD3d 520 (1st Dept., 2019); *People v. Martinez*, 164 AD3d 1260 (2d Dept., 2018); *People v. Boyd*, 151 AD3d 641 (1st Dept., 2017); *People v. Sampson*, 289 AD2d 1022 (3d Dept., 2001); *People v. Morgan*, 214 AD2d 809 (3d Dept., 1995). For this reason, the defendant's motion for an Order suppressing the identification testimony is summarily denied.

DEMAND FOR RECIPROCAL DISCOVERY

As part of his "CPL 245 Disclosure, Pre-Trial Notices and Demands" and his motion response, the prosecutor served Demands for Reciprocal Discovery pursuant to CPL 245.20 (4). The defendant filed his Certificate of Compliance on June 9, 2021.

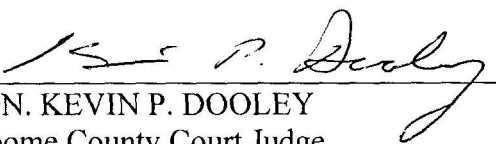
MOTION FOR FURTHER RELIEF

Criminal Procedure Law Section 255.20 provides that absent a showing of good cause, all pre-trial motions must be filed at the same time and within 45 days of arraignment. Therefore, good cause must be established before the Court will consider granting the defense leave to renew or make further motions.

The above constitutes the Decision and Order of Court.

It is so Ordered.

Dated: July 26, 2021
Binghamton, New York


HON. KEVIN P. DOOLEY
Broome County Court Judge