

People v Bonser

2021 NY Slip Op 33913(U)

July 30, 2021

County Court, Broome County

Docket Number: Indictment No. 21-164

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

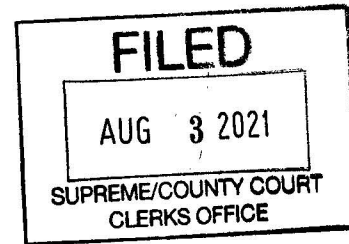
-v-

MATTHEW R. BONSER,
Defendant.

KEVIN P. DOOLEY, J.

On May 6, 2021, a Broome County Grand Jury handed up Indictment No. 21-164, charging the above-named defendant with two counts of Attempted Murder in the Second Degree, class B felonies, three counts of Burglary in the First Degree, class B felonies, one count of Robbery in the First Degree, a class B felony, one count of Assault in the First Degree, a class B felony, four counts of Assault in the Second Degree, class D felonies, Criminal Possession of a Weapon in the Fourth Degree, a class A misdemeanor, Unlawfully Fleeing a Police Officer in the Third Degree, a class A misdemeanor, Reckless Driving, an unclassified misdemeanor, and two counts of Speeding, traffic infractions. The indictment alleges that on April 17, 2021, the defendant knowingly and unlawfully entered the residence of seventy-one year old Leonard Steele, with intent to commit a crime inside, and while inside, attempted to cause the death of Mr. Steele, used or threatened the immediate use a knife, and caused physical injury to him. The indictment further alleges that the defendant knowingly and unlawfully entered the residence of Thomas Buchman, with intent to commit a crime therein, and while inside, used or threatened the immediate use of a knife, and forcibly stole a 2017 Ford motor vehicle from Mr. Buchman. The indictment also alleges that the defendant fled from police officers, who were attempting to stop the stolen vehicle he was operating, by recklessly driving at a high rate of speed, and recklessly caused serious physical injury to William Holehan.

The defendant was arraigned in Broome County Court on May 14, 2021. On June 28, 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 27, 2021. The following constitutes the Decision and Order of the Court.



DECISION AND ORDER

Indictment No. 21-164

Docket No. 70268-21

GRAND JURY MOTIONS

Motion to Dismiss Count One as Jurisdictionally Defective – CPL 210.20 (1) (h)

The defendant moves to dismiss the first count of the indictment, which charges the defendant with Attempted Murder in the Second Degree, in violation of Penal Law §§110.00 and 125.25 (3), arguing that there can be no “attempted” crime where the result of the defendant’s conduct was not intended.

Under Penal Law §125.25 (3), if, during or in immediate flight from the commission or attempted commission of a crime specified in that statute, the defendant in the crime causes the death of a person other than a participant, the defendant may be guilty of felony murder, irrespective of whether he or she intended to cause that death. However, a person cannot be convicted of an attempt to commit felony murder, because the person cannot have the specific intent to cause an unintended death. *People v. Campbell*, 72 NY2d 602 (1988); *People v. McCann*, 126 AD3d 1031 (3d Dept., 2015); *People v. Hendrix*, 56 AD2d 580 (2d Dept., 1977); *People v. Hassin*, 48 AD2d 705 (3d Dept., 1975)

Therefore, the first count of the indictment, charging Attempted Murder in the Second Degree, is dismissed.

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 23, 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 remaining offenses charged in the indictment or lesser included offenses 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 grounds the instructions given to the grand jury were “nonexistent, inaccurate, or inadequate on important points.” The Court has identified two instances where the legal instructions provided were inaccurate or so incomplete as to render two counts of the indictment defective pursuant to CPL 210.25 (1);

Count Eight - Criminal Possession of a Weapon in the Fourth Degree

Penal Law §265.01 (2) provides that a person is guilty of Criminal Possession of a Weapon in the Fourth Degree when he or she possesses a dangerous instrument *with intent to use the same unlawfully against another*. At grand jury, however, the prosecutor provided the following instructions as to this count:

With regard to count eight, I'll ask you to consider a count of criminal possession of a weapon in the fourth degree. That is defined in Penal Law, Section 265.01, subdivision 2. Under that definition, a person is guilty of criminal possession of a weapon in the fourth degree when they knowingly possess a dangerous or deadly instrument or weapon.

The grand jury was not instructed that the dangerous instrument had to be possessed with the intent to use it unlawfully against another person, and this count cannot be amended to cure the defect pursuant to CPL 200.70. Therefore, this count of the indictment must be dismissed.

Count Fifteen – Assault in the First Degree

Penal Law §120.10 (4) provides that a person is guilty of Assault in the First Degree when in the course of and in furtherance of the commission or attempted commission of a felony *or of immediate flight therefrom*, he causes serious physical injury to a person other than a participant in the crime. At grand jury, however, the prosecutor provided the following instructions for this count:

With regard to count 15, this is...this and count 16, which are our final two counts, are going to relate to the incident where it is alleged that the vehicle being driven by the defendant crashed into a vehicle being driven by Mr. Holehan on Colesville Road. So, with regard to count 15, we're going to ask you to consider a count of assault in the first degree as defined in Penal Law, Section 120.10, subdivision 4. A person is guilty of that charge *when in the course of and in furtherance of the commission or attempted commission of a felony*, in this case -- no, we're not even going to -- the participant in the commission or attempted commission of the felony causes serious physical injury to a nonparticipant, all the participants, the one who caused the serious physical injury, as well as others, are guilty of that charge.

The prosecutor continued by providing the definition of serious physical injury, and then advised "I've already discussed – I've already defined for you immediate flight," even though the grand jury was not instructed that the defendant could be charged with this crime if he caused serious physical injury to a non-participant in the course of *immediate flight* after the commission or attempted commission of a felony. The prosecutor did not identify which of the offenses allegedly committed by the defendant were felony offenses, so the grand jury may have charged the defendant with Assault in the First Degree because he caused serious physical injury to Mr. Holehan in the course of committing the misdemeanor crime of Unlawfully Fleeing a Police Officer in the Third Degree.

Given the inaccurate and incomplete legal instructions provided for Assault in the First Degree, this count of the indictment must be dismissed as it cannot be amended to cure the defect pursuant to CPL 200.70

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 remaining counts of the indictment on this ground is denied.

MOTIONS FOR DISCOVERY AND OTHER PRE-TRIAL DISCLOSURES

As part of his Omnibus Motion, the defendant has filed a Motion for Discovery and attached as Schedule I, an itemized list of demands. The prosecutor responds that on May 11, 2021, he filed and served a certificate of compliance, stating that after exercising due diligence and making reasonable inquiries to ascertain the existence of materials and information subject to discovery, he has disclosed and made available all known material and information subject to discovery. Attached to the certificate of compliance were a nine-page document entitled “CPL 245 Disclosure, Pre-Trial Notices and Demands” and Compliance Reports for Discovery Package dated April 22, 2021, April 27, 2021, April 27, 2021, May 3, 2021, May 11, 2021, May 11, 2021, May 11, 2021 and May 11, 2021. A supplemental certificate of compliance was also filed and served on July 26, 2021, attaching another nine-page document entitled “CPL 245 Disclosure, Pre-Trial Notices and Demands” and Compliance Reports for Discovery Package dated May 20, 2021, June 15, 2021, June 15, 2021, and July 26, 2021.

The Court notes that the disclosures made by the prosecutor as part of the “CPL 245 Disclosure, Pre-Trial Notices and Demands” documents dated May 11, 2021, and July 26, 2021, satisfy the defendant’s motion under former CPL §240.45 and *People v. Rosario*, 9 NY2d 286 (1961), for all written or recorded statements of any witnesses, including transcripts of the grand jury testimony of those witnesses and any information known to the prosecutor relating to any criminal convictions or pending charges of those witnesses. The prosecutor also acknowledges his duty under *Brady v. Maryland*, 373 US 83 (1963), to disclose any and all favorable or exculpatory material, advises no *Brady* material is known to exist, but will immediately provide any such material to the defendant if and when the prosecutor becomes aware of such material.

The defendant also moves for an Order compelling the prosecution to furnish a Bill of Particulars. On May 27, 2021, the defendant served a Demand for a Bill or Particulars, pursuant to CPL 220.95, requesting that the prosecutor set forth certain items of factual information not recited in the indictment, which pertain to the offenses charged, including the substance of the defendant’s alleged conduct encompassed by the charges which the prosecutor intends to prove at trial and whether the defendant acted as principal or accomplice or both. By letter dated June 2, 2021, the prosecutor responded that the date, time and place of the offenses charged are set forth in the indictment and that the defendant acted as a principal, and properly declined to

respond to the other requests for information, which are evidentiary in nature. *People v. Davis*, 41 NY2d 678 (1977); *People v. Thompson*, 27 AD3d 888 (3d Dept., 2006). Therefore, the defendant's motion for an Order compelling the prosecutor to provide a supplemental bill of particulars is denied.

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 four 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 **August 6, 2021, at 3:00 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 Preclude Statements

The defendant moves for an Order precluding any statements and admissions of the defendant made to law enforcement officers for which sufficient notice under CPL 710.30 was not given. The prosecutor responds that the defendant made no statements or admissions to any law enforcement officer. Therefore, a pre-trial hearing is not required.

Motion to Preclude and Suppress Identification Testimony

The defendant moves for an Order precluding identification testimony regarding an observation of the defendant either at the time and place of the commission of the crime or upon

some other occasion relevant to the case, by any witness who had identified him prior to trial. The prosecutor responds that at the defendant's arraignment on May 14, 2021, he served notice of his intent to introduce testimony concerning the identification of the defendant by three witnesses through photo identification procedures conducted on May 6, 2021, and disclosed copies of the arrays and "the associated case information and instructions" to the defendant on May 11, 2021, Therefore, the motion to preclude this identification evidence is denied.

The defendant also moves for an Order suppressing testimony concerning the identification of the defendant by the three witnesses through the photo identification procedures conducted on May 6, 2021, on the ground the procedures used were "unduly suggestive." The prosecutor denies that the procedures were conducted in an unnecessarily suggestive manner, and argues that the procedures comply with the statutory requirements of CPL 60.25. Therefore, a pre-trial hearing will be conducted on **August 6, 2021, at 3:00 p.m.** to determine whether the identification procedures conducted in this case complied with the provisions of the statute.

DISCLOSURE OF POTENTIAL CONFLICTS OF INTEREST

As part of his Omnibus Motion, the defendant requested an Order directing the prosecutor to disclose any and all potential witnesses he intends to call at trial, so that any potential conflicts of interest can be addressed prior to trial, if any of the potential witnesses were represented by the Public Defender's Office in the past. The defendant conceded that as of the date of the motion filing, it did not appear that any conflict of interest existed with any of the potential witnesses. It appears that this issue is now moot because the defendant recently retained the services of attorney Vincent P. Accardi to represent him.

Should either the prosecutor or Mr. Accardi become aware of a potential conflict of interest with any person who may be called as a witness at any pre-trial hearing or at trial, they should bring such potential conflict to the attention of the Court as soon as practicable.

DEMAND FOR RECIPROCAL DISCOVERY

As part of his Certificates of Compliance, the prosecutor served a Demand for Reciprocal Discovery pursuant to CPL 245.20 (4). The defendant is directed to file a response to the Demand by August 13, 2021.

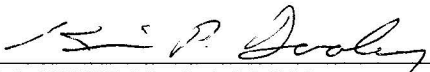
MOTION FOR FURTHER RELIEF

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 30, 2021
Binghamton, New York



HON. KEVIN P. DOOLEY
Broome County Court Judge