

People v Ellis

2021 NY Slip Op 34058(U)

June 28, 2021

County Court, Westchester County

Docket Number: Indictment No. 21-0120

Judge: Anne E. Minihan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON 6-28 2021
WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

FILED *NR*

JUN 28 2021

DECISION & ORDER
Indictment No. 21-0120

RUSSELL ELLIS,

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

-----X
MINIHAN, J.

Defendant, Russell Ellis, charged by Westchester County Indictment Number 21-0120 with Criminal Possession of a Firearm (Penal Law § 265.03[3]), has filed an omnibus motion consisting 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.

I.

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

Defendant moves pursuant to CPL 210.20(1) to dismiss the indictment and/or reduce the 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. On consent of the People, the court has reviewed the minutes of the grand jury proceeding.

Here, the evidence presented to the grand jury, if accepted as true, would be legally sufficient to establish defendant’s guilt of the charges (CPL 210.30[2]). Accordingly, defendant’s motion to dismiss the indictment is denied. Pursuant to CPL 190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. “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]).

Defendant's claim that the grand jury proceeding was defective within the meaning of CPL 210.35 is without merit. A review of the minutes reveals, inter alia, that a quorum of the grand jurors was present during the presentation of evidence, and that the Assistant District Attorney properly instructed the grand jury on the law and only permitted those grand jurors who heard all of the evidence to vote the matter (*see People v Collier*, 72 NY2d 298 [1988]; *People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

To the extent that defendant challenges the sufficiency of the indictment, that portion of the motion is denied. The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

The People acknowledge that they will comply with their obligations concerning grand jury testimony pursuant to CPL 245.20(1)(b). The court does not find it necessary to order release of those portions of the grand jury minutes as constitute colloquies or instructions.

II.

MOTION to PRECLUDE NOTICED STATEMENT TESTIMONY
CPL 710

The People served defendant with notice pursuant to CPL § 710.30(1)(a) of statement(s) allegedly made by defendant on August 31, 2020 to members of the Yonkers Police Department. Defendant moves to suppress the alleged statement(s) as involuntary, the product of an unlawful arrest, and obtained in violation of his Sixth Amendment right to counsel. On the People's consent, the court orders a pre-trial *Huntley* hearing to determine whether the alleged statement(s) were involuntary within the meaning of CPL 60.45 (*see* CPL 710.20(3); CPL 710.60[3][b]; *People v Weaver*, 49 NY2d 1012 [1980]). The hearing will also address whether the alleged statement(s) were 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]).

III.

MOTION to PRECLUDE IDENTIFICATION TESTIMONY
CPL 710

Defendant's motion to suppress identification testimony is granted to the limited extent of ordering a pre-trial *Wade* hearing (*see United States v Wade*, 388 US 218 [1967]). At the hearing, the People bear the initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness (*see People v Chipp*, 75 NY2d 327, 335 [1990] *cert. denied* 498 US 833 [1990]; *People v Berrios*, 28 NY2d 361 [1971]). Once that burden is met, the defendant bears the ultimate burden of proving that the procedure was unduly suggestive. Where suggestiveness is shown, the People must show the existence of an independent source by clear and convincing evidence.

IV.

MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct. On the People's consent, the court orders a pre-trial *Sandoval* hearing (see *People v Sandoval*, 34 NY2d 371 [1974]). At said hearing, the People shall notify the defendant, *in compliance with CPL Article 245*, of all specific instances of his criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach the defendant's credibility if he elects to testify at trial, *and in any event not less than 15 days prior to the first scheduled trial date*. 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]).

On the People's consent, if 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.

V.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL Article 245

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* material¹ 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.

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.

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.

The People recognize their continuing duty to disclose the terms of any deal or agreement made between the People and any prosecution witness at the earliest possible date (*see People v Steadman*, 82 NY2d 1 [1993]; *Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Wooley*, 200 AD2d 644 [2d Dept 1994]).

If the People have yet to provide defendant with a Bill of Particulars, they are hereby directed to provide same to defendant within three days of receipt of this order (*see CPL 200.95(3)*).

VI.

MOTION to SUPPRESS PHYSICAL EVIDENCE

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

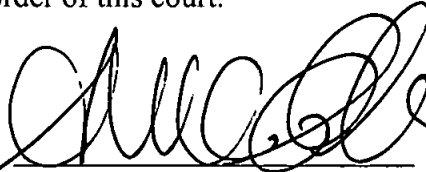
VII.

MOTION for DISCLOSURE of INFORMANTS

Defendant's motion for a "*Darden* hearing" (*see People v Darden*, 34 NY2d 177, 181 [1974]) is denied, without prejudice, for failure to show that the tip as to defendant's alleged possession of a firearm was supplied to the police by a known confidential informant (*see generally People v Adrion*, 82 NY2d 628, 634-636 [1993]). As discussed above, the propriety of defendant's arrest will be addressed at a *Mapp* hearing. If the *Mapp* hearing reveals that the tip was supplied by a known confidential informant, defendant may, if appropriate, renew the request for a *Darden* hearing.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
June 28, 2021


Honorable Anne E. Minihan
Acting Justice of the Supreme Court

To:

HON. MIRIAM E. ROCAH
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr., Blvd.
White Plains, New York 10601
motions@westchesterda.net

ROBERT G. SCHNEIDER, ESQ.
498A Heritage Hills
Somers, NY 10589
Attorney for defendant, Russell Ellis