

People v Johnson

2021 NY Slip Op 34139(U)

December 1, 2021

Supreme Court, Westchester County

Docket Number: Ind. No. 21-00487-01

Judge: Robert A. Neary

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DEC - 1 2021

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

<p>FILED AND ENTERED ON <u>12-1-2021</u> WESTCHESTER COUNTY CLERK</p>
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

- against -

DECISION AND ORDER

FABIAN JOHNSON,

Ind. No. 21-00487-01

Defendant.

-----X
NEARY, J.

The defendant, Fabian Johnson, has been charged with the crimes of Criminal Possession of a Weapon in the Second Degree (four counts), Attempted Assault in the First Degree, Reckless Endangerment in the First Degree and Menacing in the Second Degree. The defendant has made an omnibus motion which consists of a Notice of Motion and an Affirmation in support thereof. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law. Having read all of the submitted papers and reviewed the court file, this Court makes the following determination.

1. MOTION TO INSPECT GRAND JURY MINUTES AND DISMISS THE INDICTMENT

The defendant's motion to inspect the Grand Jury minutes is granted. Upon an *in camera* inspection of the Grand Jury minutes by Court, the motion to dismiss the indictment or reduce a charged offense in the indictment is denied.

The Court has reviewed the minutes of the proceeding before the Grand Jury. The Grand Jury was properly instructed (see *People v. Calbud*, 49 NY2d 389, 426 NYS2d 389, 402 NE2d 1140 and *People v. Valles*, 62 NY2d 36, 476 NYS2d 50, 464 NE2d 418) and the evidence presented, if accepted as true would be legally sufficient to establish every element of the offenses charged. [See CPL §210.30(2)]. In addition, the minutes reveal 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, and that it was instructed that only those grand jurors who had heard all the evidence could participate in voting on the matter.

The Court does not find that the release of the Grand Jury minutes or certain portions thereof to the parties was necessary to assist the Court in making this determination.

2. MOTION TO SUPPRESS/PRECLUDE IDENTIFICATION EVIDENCE

The People have filed three (3) 710.30 notices pertaining to identifications of the defendant. However, none of the procedures described in the notices are the type that are subject to suppression as they do not involve a selection process but merely reflect a viewing of surveillance video of the crime in progress. [See *People v. Gee*, 99 AD2d 158].

Moreover, it is clear from the Grand Jury materials that each identifying witness had a prior familiarity with the defendant the basis of which would render that witness

impervious to suggestion with respect to any identification procedure. [See *People v. Rodriguez*, 78 NY2d 445]. Therefore, the Court finds that there is no basis for suppress or a hearing on this matter.

3. MOTION TO SUPPRESS/PRECLUE PHYSICAL EVIDENCE

The defendant's motion to suppress physical evidence obtained pursuant to two (2) search warrants is denied. The Court has reviewed the affidavits in support of the search warrants in question and finds that they did provide the signing magistrate with probable cause to believe the evidence could be located at the location described in the warrant. As there are no allegations of any other property being seized in connection with this matter, the motion to suppress physical evidence is denied.

4. MOTION TO SUPPRESS/PRECLUDE DEFENDANT'S STATEMENTS

This branch of the defendant's motion is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by the defendant, which have been noticed by the People pursuant to CPL §710.30 (1)(a), were involuntarily made by the defendant within the meaning of CPL §60.45 (see CPL §710.20(3), CPL §710.60[3][b]; *People v. Weaver*, 49 NY2d 1012, 429 NYS2d 399, 406 NE2d 1335), 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, 99 S. Ct. 2248, 60 LE2d 824).

5. MOTION TO PRECLUDE EVIDENCE OF PRIOR BAD ACTS and MOTION FOR C.P.L. SECTION 240.43 DISCLOSURE

Immediately prior to commencement of jury selection, the prosecutor shall, upon request of the defendant, notify the defendant of any prior criminal act which the People seek to use in the cross-examination of the defendant as well as all specific instances of the defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for the purposes of impeaching the credibility of the defendant. Thereafter, upon the defendant's request, the trial court shall conduct a *Sandoval* and/or *Ventimiglia* hearing prior to the commencement of trial. [See *People v. Sandoval*, 34 NY2d 371 (1974); *People v. Ventimiglia*, 52 NY2d 350 (1981); *People v. Molineux*, 168 NY 264 (1901)].

6. MOTION FOR BRADY MATERIAL

The People recognize their continuing duty to disclose exculpatory material at the earliest possible date. [See *Brady v. Maryland*, 373 US 83, 83 S Ct. 1194, 10 LE2d 215 and *Giglio v. United States*, 405 US 150, 92 S Ct. 763, 31 LE2d 104]. If the People are or become aware of any material which is arguable exculpatory, but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its *in camera* inspection and determination as to whether such will be disclosed to the defendant.

7. MOTION TO MAKE ADDITIONAL PRE-TRIAL MOTIONS

Upon a proper showing, the Court will entertain appropriate additional motions based upon grounds of which the defendant could not, with due diligence, have been previously

aware, or which, for other good cause, could not reasonably have been raised in this motion.

[See CPL §255.20(3)].

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
December 1, 2021



ROBERT A. NEARY
SUPREME COURT JUSTICE

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