

People v Smith

2022 NY Slip Op 34748(U)

February 8, 2022

County Court, Westchester County

Docket Number: Indictment No. 21-0447

Judge: Robert J. Prisco

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

DECISION & ORDER

MICHAEL SMITH,

Indictment No: 21-0447

Defendant.

-----X
ROBERT J. PRISCO, J.

Defendant **MICHAEL SMITH** is charged by Indictment Number 21-0447 with two counts of Attempted Gang Assault in the First Degree pursuant to Penal Law [PL] §§ 110 and 120.07 [Counts One and Three], one count of Attempted Assault in the Second Degree pursuant to PL §§ 110 and 120.05 (2) [Count Two], two counts of Attempted Assault in the First Degree pursuant to PL §§ 110 and 120.10 (1) and (4) [Counts Four and Five], two counts of Assault in the Second Degree pursuant to PL § 120.05 (2) and (6) [Counts Six and Seven], one count of Robbery in the First Degree pursuant to PL § 160.15 (3) [Count Nine] and two counts of Robbery in the Second Degree pursuant to PL § 160.10 (1) and (2) (a) [Counts Ten and Eleven]. In sum and substance, the charges pertain to Defendant's alleged intentional attempt with others to cause serious physical injury to an individual by means of a dangerous instrument and the resulting injury allegedly sustained by that individual and Defendant's alleged participation with others in the forcible theft of property from said individual. The above offenses are alleged to have occurred at 1 Park Avenue in the City of Mount Vernon, at approximately 1:30 a.m. on October 31, 2020.

On October 12, 2021, Defendant was arraigned by the Honorable David S. Zuckerman on the charges contained in Indictment Number 21-0447. Attached to the indictment are four (4) CPL § 710.30 (1) (b) Notices signifying the People's intent to offer testimony of observations of the defendant either at the time or place of the commission of the offenses or upon some other relevant occasion by a witness or witnesses who have previously identified him as such,¹ and the People's

¹ The CPL § 710.30 (1) (b) notices pertain to two (2) single photograph identifications that allegedly occurred at approximately 9:15 a.m. and 12:30 p.m. on September 7, 2021 at 111 Dr. Martin Luther King Jr. Blvd., White Plains, N.Y., and two (2) video identifications that allegedly occurred at approximately 9:00 a.m. and 12:15 p.m. on the same date and at the same location.

FILED

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FEB - 8 2022

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Demand for a Notice of Alibi pursuant to CPL § 250.20.

On November 8, 2021, the People filed a Certificate of Compliance pursuant to CPL § 245.50 (1) which includes a “Statement of Readiness,” wherein “[t]he People confirm and announce their readiness for trial on all counts charged.” Attached to the Certificate of Compliance is a copy of the People’s Discovery Disclosure Index pursuant to CPL §§ 245.20 and 245.50, which includes but is not limited to disclosures pertaining to Grand Jury testimony and Judgments of Conviction for defendants and witnesses excluding law enforcement and expert witnesses. Also attached to the Certificate of Compliance are Discovery Package Transmittal Notices from the Westchester County District Attorney’s Office.

A Notice of Motion, an Attorney’s Affirmation in Support of Omnibus Motion, and a Memorandum of Law in Support of Defendant’s Pre-Trial Motions (hereinafter “Memorandum of Law”), all dated December 10, 2021, were thereafter filed by Defendant, seeking various forms of judicial intervention and relief.

On December 27, 2021, the People filed an Affirmation in Opposition and a Memorandum of Law. The People have also provided the Court with an unredacted certified copy of the stenographic transcript of the September 7, 2021 Grand Jury proceeding, along with copies of the Grand Jury Exhibits.

After consideration of the above referenced submissions and the unredacted certified stenographic transcript of the September 7, 2021 Grand Jury proceeding, the Court decides Defendant’s Motion as follows:

1. MOTION FOR INSPECTION OF GRAND JURY MINUTES AND DISMISSAL OR REDUCTION OF THE CHARGES CONTAINED IN INDICTMENT NUMBER 21-0447 DUE TO THE LEGAL INSUFFICIENCY OF THE EVIDENCE PRESENTED AND THE INSTRUCTIONS PROVIDED.

Citing CPL §§ 210.20 (1) (b), (1-a) and 210.30, Defendant requests that the Court inspect the minutes of the Grand Jury proceeding and dismiss Indictment 21-0447 or certain counts thereof “as not supported by legally sufficient evidence” (*see* Paragraph (a), Page 1, of Defendant’s Notice of Motion and Point 1, Page 2, of Defendant’s Memorandum of Law). Defendant also requests that the Court inspect the minutes of the Grand Jury proceeding to determine whether the provided instructions were legally sufficient and proper and whether the Grand Jury proceeding was defective (*see* Point 1 (a)- (t), Pages 2-5, of Defendant’s Memorandum of Law).

In their response, the People consent to an in-camera inspection of the Grand Jury minutes by the Court, contend that the indictment is supported by legally sufficient evidence (*see* Point I, Pages 1-2, of the People’s Memorandum of Law), and assert that “Defendant has failed to meet his high burden of showing the existence of any error in the grand jury proceeding which rendered it defective” (*see* Point I, Page 2, of the People’s Memorandum of Law).

The Court has conducted an in-camera review of the entirety of the Grand Jury proceeding, having examined an unredacted certified copy of the stenographic transcript of the September 7, 2021 presentation.

On September 7, 2021, prior to the commencement of the given sworn testimony, the People specifically inquired of and confirmed with the foreperson that twenty (20) grand jurors were present. The subsequent 20-0 vote to indict on the ten charges presented for their consideration regarding Defendant satisfies this Court that the twenty grand jurors who deliberated and voted on the charges contained in Indictment Number 21-0447 were present throughout the one-day presentation of the case.

“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 [2003], quoting *People v Carroll*, 93 NY2d 564, 568 [1999]; *see People v Bello*, 92 NY2d 523, 525 [1998]; *People v Jensen*, 86 NY2d 248, 251 [1995]; *People v Jennings*, 69 NY2d 103, 114 [1986]; *People v Booker*, 164 AD3d 819, 820 [2d Dept 2018]; *People v Hulsen*, 150 AD3d 1261, 1262 [2d Dept 2017], *lv. denied* 30 NY3d 950 [2017]; *People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). Legally sufficient evidence is “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 Mills*, 1 NY3d at 274; *People v Franov*, 146 AD3d 978, 979 [2d Dept 2017]; *People v Wisey*, 133 AD3d 799, 800 [2d Dept 2015]; *People v Ryan* 125 AD3d 695, 696 [2d Dept 2015], *lv. denied* 25 NY3d 1077 [2015]). “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], quoting *People v Bello*, 92 NY2d at 526; *see People v Ryan*, 125 AD3d at 696; *People v Woodson*, 105 AD3d 782, 783 [2d Dept 2013]). This 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’” (*People v Bello*, 92 NY2d at 526, quoting *People v Deegan*, 69 NY2d 976, 979 [1987]; see *People v Pino*, 162 AD3d 910, 911 [2d Dept 2018]; *People v Arcila*, 152 AD3d 783, 784 [2d Dept 2017], *lv. denied* 30 NY3d 978 [2017]).

Here, the evidence presented to the Grand Jury, when viewed in the light most favorable to the People, was legally sufficient to establish and support the charges contained in Indictment Number 21-0447.

A Grand Jury proceeding is “defective,” warranting dismissal of the indictment, only where the “proceeding . . . fails to conform to the requirements of CPL Article 190 to such degree that the integrity thereof is impaired and prejudice to the defendant may result” (CPL § 210.35 (5); see *People v Arevalo*, 172 AD3d 891, 892 [2d Dept 2019]; *People v Williams*, 171 AD3d 804, 805 [2d Dept 2019]). Dismissal of an indictment under CPL § 210.35 (5) is an “exceptional remedy” that “should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury” (*People v Huston*, 88 NY2d 400, 409 [1996]; see *People v Williams*, 171 AD3d at 805; *People v Burch*, 108 AD3d 679, 680 [2d Dept 2013], *lv. denied* 22 NY3d 1087 [2014]; *People v Thompson*, 81 AD3d 670, 671 [2d Dept 2011], *aff’d* 22 NY3d 687 [2014]). In the case at bar, the Court finds that no such wrongdoing, conduct or errors occurred.

While a prosecutor is required to instruct the grand jury on the law with respect to matters before it (*People v Valles*, 62 NY2d 36, 38 [1984]; *People v Tunit*, 149 AD3d 1110, 1110 [2d Dept 2017]; *People v Samuels*, 12 AD3d 695, 698 [2d Dept 2004]; see CPL § 190.25 (6)), “a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law” (*People v Calbud, Inc.*, 49 NY2d 389, 394 [1980]; see *People v Caracciola*, 78 NY2d 1021, 1022 [1991]; *People v Batashure*, 75 NY2d 306, 311 [1990]; *People v Goetz*, 68 NY2d 96, 115 [1986]; *People v Valles* 62 NY2d 36, 38 [1984]; *People v Tunit*, 149 AD3d at 1110; *People v Castaldo*, 146 AD3d 797, 798 [2d Dept 2017]; *People v Burch*, 108 AD3d at 680; *People v Malan-Pomaeyna*, 72 AD3d 988 [2d Dept 2010]). It is well settled that such instructions are sufficient so long as they provide “enough information to enable [the grand jury] intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime” (*People v Calbud, Inc.*, 49 NY2d at 394-395; see *People v Valles* 62 NY2d at 38; *People v Tunit*, 149 AD3d at 1110-1111; *People v*

Patterson, 73 AD3d 1215, 1215 [2d Dept 2010], *lv. denied* 15 NY3d 776 [2010]; *People v Malan-Pomaeyna*, 72 AD3d at 988).

Here, after an in-camera review of the unredacted certified copy of the stenographic transcript of the Grand Jury presentation on September 7, 2021, this Court determines that the Grand Jury proceeding was not defective and that the instructions given during the presentation were legally sufficient and proper.

Accordingly, for the reasons set forth above, Defendant's motion to dismiss or reduce the charges contained within Indictment Number 21-0447 is denied.

2. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY.

Citing CPL Article 710 and *United States v Wade*, 338 US 218 (1967), Defendant moves to suppress any "pre-trial identifications of the defendant noticed by the People" (*see* Paragraph (b), Page 1, of Defendant's Notice of Motion and Point II, Page 6, of Defendant's Memorandum of Law). In the alternative, Defendant requests that the Court conduct a "*Wade* hearing" (*see* Paragraph (b), Page 1, of Defendant's Notice of Motion).

In response, the People contend that Defendant's motion should be denied because "the identifications at issue are not subject to suppression pursuant to CPL 710.30" (*see* Point II, Page 5, of the People's Memorandum of Law). Specifically, the People argue that Defendant's former probation officer was "properly offering her lay opinion that the person in the video and in the photograph was defendant" (*see* Point II, Page 5, of the People's Memorandum of Law)² and therefore "there is no concern regarding suggestiveness" (*see* Point II, Page 6, of the People's Memorandum of Law).

Defendant's motion to suppress is granted to the extent that a *Wade* hearing will be held in connection with the four (4) noticed identifications. As the People contend that the defendant's former probation officer was so familiar with Defendant so as to negate any possibility of suggestiveness (*see* Point II, Pages 5-6, of the People's Memorandum of Law), the Court will conduct a hearing pursuant to *People v Rodriguez*, 79 NY2d 445, 454 [1992], in connection with

² In the case of *People v Ray*, 100 AD3d 933 [2d Dept 2012], cited by the People in support of this argument, the Court permitted a detective "who had encountered the defendant on numerous occasions over more than 15 years" (*id.* at 933) to offer opinion testimony that the person depicted in a surveillance video was the defendant.

such identification(s).

3. MOTION FOR PRECLUSION OF DEFENDANT'S PRIOR CRIMES OR BAD ACTS; ASSOCIATED SANDOVAL AND VENTIMIGLIA HEARINGS.

Relying on *People v Sandoval*, 34 NY2d 371 [1974], and *People v. Ventimiglia*, 52 NY2d 350 [1981], Defendant requests “a hearing to determine the admissibility of any prior criminal or bad acts for use by the [P]eople on their direct case or during the cross examination of the defendant” (*see* Paragraph (c), Page 1, of Defendant’s Notice of Motion and Point III, Page 7, of Defendant’s Memorandum of Law).

In response, the People acknowledge their *Sandoval* and *Ventimiglia* obligations and consent to hearings on same if such disclosure is made (*see* Point III, Page 7, of the People’s Memorandum of Law).³ The People also indicate that should they “seek to introduce defendant’s prior bad acts on their direct case, the People will inform defense counsel and the Court and request a hearing before introducing such *Molineux* evidence” (*see* Point III, Page 7, of the People’s Memorandum of Law).

CPL § 245.20 (3) (a) provides, in substance and pertinent part, that “[t]he prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, which the prosecution intends to use at trial for purposes of impeaching the credibility of the defendant.” To the extent that the People seek to use any of Defendant’s prior acts of misconduct or criminality on their direct case as substantive proof of any material issue in the case, CPL § 245.20 (3) (b) likewise obligates “[t]he prosecution [to] disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, which the prosecution intends to use at trial [for such purpose].” Lastly, CPL § 245.20 (3) further requires that “the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.”

As the People have concededly not yet disclosed to the defendant a list of his acts of misconduct and criminality which the prosecution intends to use at trial for purposes of impeaching

³ Item P of the Discovery Disclosure Index, referring to “Judgments of Conviction for Defendants and Witnesses Excluding Law Enforcement and Expert Witnesses,” indicates that Defendant’s “Criminal History” was provided on October 19, 2021 via the “Portal.”

his credibility or as substantive proof of any material issue in the case, or designated their intended use thereof, this Court will not order the requested *Sandoval* and *Ventimiglia* hearings at the present time. Should the People seek to use at trial any prior acts of misconduct or criminality of the defendant for CPL § 245.20 (3) (a) or (b) purposes, they are directed to disclose to Defendant a list of all such acts of misconduct and criminality and to designate the intended purpose of each listed act. Pursuant to CPL § 245.10 (1) (b), the People “shall perform [these] supplemental discovery obligations *as soon as practicable* but not later than fifteen (15) calendar days prior to the first scheduled trial date” (emphasis added). If the People do so, Defendant may renew his application to preclude the People’s use of such acts of misconduct or criminality at trial or, in the alternative, request a hearing thereon to determine the admissibility thereof. If the People fail to do so, no use of such acts will be permitted at trial.

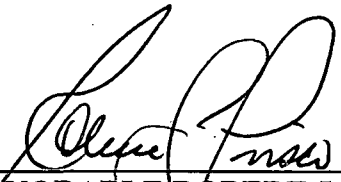
4. RESERVATION OF RIGHTS TO MAKE ADDITIONAL PRE-TRIAL MOTIONS.

Defendant’s request to make additional pre-trial motions (*see* Page 2 of Defendant’s Notice of Motion and Page 8 of Defendant’s Memorandum of Law) is granted to the extent that, if sought, he will be required to serve and file an Order to Show Cause detailing the reason(s) why said motions were not brought in conformity with the time provisions and motions practice set forth in CPL § 255.20 (1) and (2), respectively.

However, notwithstanding the provisions of CPL § 255.20 (1) and (2), this Court will “entertain and decide on its merits, at any time before the end of the trial, any appropriate pre-trial motion 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 within the period specified in [CPL § 255.20 (1)] or included within the single set of motion papers as required by [CPL § 255.20 (2)]” (CPL § 255.20 (3); *see People v Wisdom*, 23 NY3d 970, 972 [2014]; *People v Marte*, 197 AD3d 411, 413 [1st Dept 2021]; *People v Burke*, 174 AD3d 915, 915 [2d Dept 2019]; *People v Milman*, 164 AD3d 609, 610 [2d Dept 2018]).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 8, 2022



HONORABLE ROBERT J. PRISCO
County Court Judge

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