

People v Shellman

2022 NY Slip Op 34749(U)

January 7, 2022

County Court, Westchester County

Docket Number: Indictment No. 21-00311-2

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 1-10-2022
WESTCHESTER
COUNTY CLERK

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

-against-

FILED

JAN 10 2022

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

AMENDED¹
DECISION & ORDER
Indictment No. 21-00311-2

CLIFFORD SHELLMAN,

-----X
MINIHAN, J.

Defendant, Clifford Shellman, is charged by Westchester County Indictment Number 21-00311, individually, with Operating as a Major Trafficker (Penal Law § 220.77[3]) and, together with codefendants Lavoy Shellman, Raven Moses, Darien Caines, Daniel Zerbo, Sebrina McKelvey, Emmanuel Burgess, Darren Workman, Jarrick Rogers and Barry Brown, with Conspiracy in the Second Degree (Penal Law §105.15) and, together with codefendant Lavoy Shellman, with Criminal Possession of a Controlled Substance in the First Degree (Penal Law § 220.21[1]) (three counts), and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (three counts).

The indictment charges codefendant Lavoy Shellman, individually, with Operating as a Major Trafficker (Penal Law § 220.77[3]), Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (three counts) and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (three counts), and, together with codefendant Raven Moses, with Criminal Possession of a Controlled Substance in the Second Degree (Penal Law § 220.18[1]) and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]), and together with codefendant Darren Workman, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (two counts) and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (two counts).

The indictment charges codefendant Barry Brown, individually, with Criminal Possession of a

¹This decision is amended only to the extent of ordering a pre-trial *Wade* hearing (see Point VI) and, on the consent of the People, *Mapp* and *Dunaway* hearings (see Point VII). Subsequent to the Court’s Decision and Order dated December 8, 2021, the defendant filed a Motion to Reargue. That motion, for the first time, requested *Mapp* and *Dunaway* hearings but did not contain any facts in support thereof. The motion also sought a *Wade* hearing. On or about December 27, 2021, the People opposed defendant’s Motion to Reargue and defendant submitted a reply to that opposition on or about December 28, 2021. On or about January 5, 2022, defendant submitted an amended omnibus motion, again seeking *Mapp*, *Dunaway*, and *Wade* hearings. This time defendant asserted facts and made legal argument. The People, by letter to the Court and defense counsel dated January 6, 2022, consented to the Court granting *Mapp* and *Dunaway* hearings.

Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (six counts), and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (six counts).

The indictment charges codefendant Darien Caines, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (four counts), and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (four counts).

The indictment charges codefendant Daniel Zerbo, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16) (three counts).

The indictment charges codefendant Jarrick Rogers, individually, with Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (five counts), and Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (two counts).

Defendant 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, DISMISS and/or REDUCE
CPL ARTICLE 190

Defendant moves pursuant to CPL 210.20 to dismiss the indictment, or reduce the counts thereof, on the grounds that the evidence before the Grand Jury was legally insufficient, and 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 proceedings before the Grand Jury.

The court denies defendant's motion to dismiss or reduce the counts in the indictment for legally insufficient evidence because a review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged, *including that the defendant possessed narcotics in excess of eight ounces* (see CPL 210.30 [2]). 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 argument that there is no evidence corroborating the police officers inferences and interpretations of the wiretap conversations is of no moment.* Here, the evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]).

With respect to defendant’s claim that the Grand Jury proceeding was defective within the meaning of CPL 210.35, a review of the minutes reveal 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 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]).

II.

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* material² and *Rosario* material, shall be provided forthwith. Leave is granted for either party to seek a protective order (CPL Article 245). *As to the defendant’s motion to vacate the protective order dated June 30, 2021 and to unseal the affidavit in support is denied since the protective order balances the defendant’s rights and the disclosure of the identity of the prosecution’s witnesses. In any event, there are steps that the trial court can take in order to ameliorate any potential prejudice to the defendant.* 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.

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. To the extent the People cross-move for reciprocal discovery, it is likewise granted to the extent provided for in CPL Article 245.

² 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.

Defendant's request for a bill of particulars is denied as untimely (CPL 200.95). 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]).

III.

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, or 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 so used by the People. 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.

IV.

MOTION to PRECLUDE
UNNOTICED STATEMENTS & IDENTIFICATIONS

This motion to preclude the People from introducing statements and identifications at trial that were not noticed is denied as premature. The People acknowledge the statutory requirements of CPL 710.30.

V.

LEAVE TO MAKE ADDITIONAL MOTIONS

Defendant's motion for leave to make additional motions is denied. Defendant must demonstrate good cause for any further pre-trial motion for omnibus relief, in accordance with CPL 255.20(3).

VI.

MOTION to
PRECLUDE IDENTIFICATION TESTIMONY
CPL ARTICLE 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.

Defendant's motion to preclude the People from introducing identifications at trial that have not been noticed is denied as premature. The People acknowledge the statutory requirements of CPL 710.30.

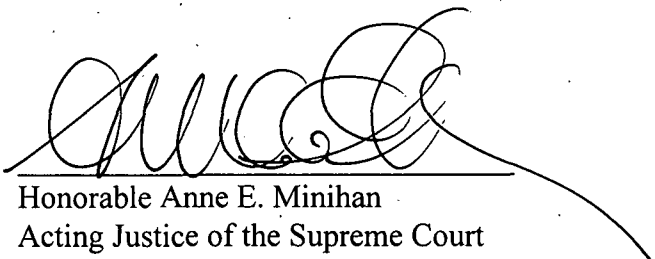
VII.

MOTION to SUPPRESS PHYSICAL EVIDENCE

On consent of the People, this branch of the defendant's motion is granted solely to the extent of conducting a *Mapp* hearing prior to trial to determine the propriety of any search resulting in the seizure of property (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing will also address whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

The foregoing constitutes the *amended* decision and order of this court.

Dated: White Plains, New York
January 7, 2022


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, NY 10601
Attn: ADA Diego Hernandez
dhernandez@westchesterda.net

Harold B. Ramsey, Jr., Esq.
305 Broadway
Suite 7th Floor
New York , NY 10007
haroldramseyjr@aol.com
Attorney for defendant, Clifford Shellman