

People v Bailey

2022 NY Slip Op 34861(U)

September 8, 2022

County Court, Westchester County

Docket Number: Indictment No 71280-22

Judge: Robert J. Prisco

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

FILED

-against-

OCT 12 2022 DECISION & ORDER

DAYQUAN BAILEY A/K/A DYQUAN BAILEY,

COUNTY OF WESTCHESTER Indictment No: 71280-22
Defendant.

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

Defendant **DAYQUAN BAILEY A/K/A DYQUAN BAILEY** is charged by Indictment Number 71280-22 with two counts of Criminal Sale of a Controlled Substance in the Third Degree pursuant to Penal Law [PL] § 220.39 (1) [Counts One and Three] and two counts of Criminal Possession of a Controlled Substance in the Third Degree pursuant to PL § 220.16 (1) [Counts Two and Four]. The charges pertain to Defendant's alleged possession and sale of cocaine in the vicinity of Elm and Linden Streets in the City of Yonkers,¹ on March 9 and 10, 2022.

On June 8, 2022, Defendant was arraigned by the Honorable Robert A. Neary on the charges contained in Indictment Number 71280-22. Attached to the indictment are the People's Demand for Notice of Alibi pursuant to Criminal Procedure Law [CPL] § 250.20 and a CPL § 710.30 (1) (b) Notice signifying the People's intent to offer testimony of an identification of the defendant from a photographic array that "was made pursuant to a blind or blinded procedure."²

On July 12, 2022, the People served and filed via email a Certificate of Compliance pursuant to CPL § 245.50 (1), and included therein is a "Statement of Readiness" in which "[t]he People confirm and announce their readiness for trial on all counts charged." Attached to the Certificate of Compliance is a reminder by the People of Defendant's reciprocal discovery obligations, and a copy of the People's Discovery Disclosure Index pursuant to CPL §§ 245.20

¹ While the People stated in their Affirmation in Opposition that the specific "location is undisclosed for the safety of the undercover police officer" (*see* Page 2, Footnote 4) and further indicated in the Discovery Disclosure Index attached to the Certificate of Compliance that the time and place of the offenses was not being provided pursuant to CPL § 245.20 (1) (d), such information was provided by the People during a conference on July 1, 2022.

² The identification allegedly occurred at a "[p]redetermined [l]ocation" at 1:36 p.m. on March 9, 2022.

and 245.50, which includes, but is not limited to, disclosures pertaining to Judgments of Conviction for defendants and witnesses excluding law enforcement and expert witnesses.

On July 14, 2022, the People served and filed via email a Supplemental Certificate of Compliance,³ and included therein is a “Statement of Readiness” in which “[t]he People re-confirm and continue to announce their readiness for trial on all counts charged.” Attached to the Supplemental Certificate of Compliance is a copy of the People’s Discovery Disclosure Index.

On July 20, 2022, the People served and filed a second Supplemental Certificate of Compliance via email, and included therein is a “Statement of Readiness” in which “[t]he People re-confirm and continue to announce their readiness for trial on all counts charged.” Attached to the second Supplemental Certificate of Compliance is a copy of the People’s Discovery Disclosure Index, which references additional disclosures pertaining to Grand Jury testimony and Discovery Package Transmittal Notices⁴ from the Westchester County District Attorney’s Office.

On August 1, 2022, the People served and filed a third Supplemental Certificate of Compliance via email,⁵ and included therein is a “Statement of Readiness” in which “[t]he People re-confirm and continue to announce their readiness for trial on all counts charged.” Attached to the third Supplemental Certificate of Compliance is a copy of the People’s Discovery Disclosure Index and a Discovery Package Transmittal Notice from the Westchester County District Attorney’s Office.

Thereafter, the Court received Defendant’s Affirmation, Notice of Motion, and Memorandum of Law, all dated July 21, 2022, seeking various forms of judicial intervention and relief.

In response, on August 4, 2022, the People served and filed an Affirmation in Opposition and a Memorandum of Law. The Court has also been provided with unredacted certified copies of the stenographic transcripts of the instructions on the law that were provided on May 11 and

³ Within the Supplemental Certificate of Compliance, the People represent that the additional items that have been provided to the defendant include “[u]pdated information regarding previously provided 1k materials” and “[u]pdated non-law enforcement witnesses and 1k materials, as well as expert witness updates.”

⁴ A Discovery Package Transmittal Notice from the Westchester County District Attorney’s Office reflects transmittal of the Grand Jury transcript to defense counsel on July 20, 2022.

⁵ Within the third Supplemental Certificate of Compliance, the People represent that the additional items that have been provided to the defendant include “Laboratory analytics completed by the City of Yonkers Police Department Forensic Science Laboratory and Provided to the Westchester County District Attorney’s Office (sent to defense counsel via the Discovery portal on July 28, 2022).”

May 13, 2022, an unredacted certified copy of the stenographic transcript of the May 13, 2022 Grand Jury presentation, two “Drug Chemistry Report[s]” that were received in evidence, and a flash drive depicting the other exhibits that were received in evidence during the Grand Jury presentation.

After consideration of the above referenced submissions and the aforementioned unredacted certified stenographic transcripts, the Court decides Defendant’s Motion as follows:

1. MOTION FOR RELEASE OF THE GRAND JURY MINUTES TO DEFENDANT AND DISMISSAL OR REDUCTION OF THE CHARGES CONTAINED IN INDICTMENT NUMBER 71280-22 DUE TO THE LEGAL INSUFFICIENCY OF THE EVIDENCE PRESENTED.

Citing CPL Article 210 and CPL §§ 210.45 and 210.20 (1) (b), Defendant moves for “the dismissal of the indictment on the grounds that the evidence before the Grand Jury was legally insufficient or in the alternative, [to] reduce said counts of [the] indictment for insufficient evidence” (*see* Point A, Page 1, of Defendant’s Notice of Motion and Pages 1-2 of Defendant’s Memorandum of Law). Specifically, Defendant contends that the grand jury should have been “instructed on the Defendant’s affirmative defense or defense where it is supported by the evidence” (*see* Page 1 of Defendant’s Memorandum of Law). Citing CPL § 245.20 (1) (b), Defendant further requests that the Court disclose the grand jury minutes to defense counsel (*see* Page 1 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 (*see* Point A, Page 1, of the People’s Memorandum of Law), contend that they have complied with their obligations pursuant to CPL § 245.20 (1) (b) (*see* Point A, Page 2, of the People’s Memorandum of Law), and assert that the indictment is supported by legally sufficient evidence (*see* Point A, Page 2, of the People’s Memorandum of Law). The People also aver 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 A, Page 3, of the People’s Memorandum of Law). Specifically, the People contend that while Defendant does not specify the affirmative defense that should have been instructed, to the extent Defendant was “referencing an affirmative defense of entrapment,” that “no such evidence was established before the Grand Jury; therefore, no such charge was required” (*see* Point A, Page 4, of the People’s Memorandum of Law).

Initially, regarding Defendant's request for disclosure of the legal instructions to the defense, this Court notes that CPL § 245.20 (1) (b) provides for automatic discovery of "[a]ll transcripts of the *testimony* of a person who has testified before a grand jury" (emphasis added). Similarly, CPL § 210.30 (3), which addresses motions to inspect grand jury minutes, speaks only to the release of "grand jury *testimony* (emphasis added)." Accordingly, as there exists no statutory authority for the release to Defendant of those portions of the Grand Jury minutes that constitute colloquy or instructions and as the People have complied with the discovery mandate of CPL § 245.20 (1) (b) by providing the defendant with the transcript of the testimony of the three (3) witnesses who testified before the Grand Jury,⁶ the defendant's request for the Grand Jury minutes in their entirety is denied.

The Court has conducted an in-camera review of the entirety of the Grand Jury proceeding, having examined the unredacted certified copies of the stenographic transcripts of the instructions on the law that were provided on May 11 and May 13, 2022, and of the May 13, 2022 presentation. The record establishes that the twenty (20) grand jurors who deliberated and voted on the four (4) charges pertaining to Defendant in Indictment Number 71280-22, were present for said instructions and throughout the one-day presentation.

"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 Castro*, 2022 NY Slip Op 00874 [2d Dept 2022]; *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

⁶ While the People's Discovery Disclosure Index attached to the Certificate of Compliance and Supplemental Certificate of Compliance indicate that the Grand Jury transcript was unavailable for disclosure within the time frame of CPL § 245.10 "due to the limited availability of transcription resources," the People have since "provided defendant with a transcript of the grand jury evidence [on July 20, 2022]" (see Point A, Page 2, of the People's Affirmation in Opposition; see also third Supplemental Certificate of Compliance and attached Discovery Disclosure Index).

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]). 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 71280-22.

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 Mitchell*, 188 AD3d 1101, 1102 [2d Dept 2020]; *People v Sealy*, 181 AD3d 893, 894 [2d Dept 2020]; *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 Addimando*, 197 AD3d 106, 121 [2d Dept 2021]; *People v Sealy*, 181 AD3d at 894; *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, 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 copies of the stenographic transcripts of the instructions on the law that were provided on May 11 and May 13, 2022, and of the May 13, 2022 presentation, this Court determines that the Grand Jury proceeding was not defective and that the instructions given in connection therewith were legally sufficient and proper.

Accordingly, for the reasons set forth above, Defendant’s motion to dismiss the charges contained within Indictment Number 71280-22 is denied.

2. MOTION FOR SANDOVAL AND VENTIMIGLIA HEARINGS.

Relying on *People v Sandoval*, 34 NY2d 371 [1974], and *People v Ventimiglia*, 52 NY2d 350 [1981], Defendant requests pretrial hearings to determine the admissibility of “any and all alleged criminal convictions or criminal, vicious or immoral acts of the Defendant” (see Point B, Pages 1-2, of Defendant’s Notice of Motion and Page 2 of Defendant’s Memorandum of Law).

In response, the People acknowledge their supplementary disclosure obligations pursuant to CPL §§ 245.10 (1) (b) and 245.20 (3), and consent to *Sandoval* and *Ventimiglia* hearings on such if disclosure is made (see Point B, Page 6, of the People’s Memorandum of Law).⁷ The People also indicate that should they “seek to introduce defendant’s prior bad acts on their direct case, [they] will inform defense counsel and the Court and request a hearing (pursuant to *People v Molineux*, 168 NY 264 [1901])” (see Point B, Page 6, of the People’s Memorandum of Law).

⁷ Discovery Package Transmittal Notices from the Westchester County District Attorney’s Office attached to the second Supplemental Certificate of Compliance reflect transmittal of Defendant’s rap sheet to defense counsel on June 23 and July 7, 2022.

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 his credibility or as substantive proof of any material issue in the case, and designated the 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.

C. MOTION TO SUPPRESS IDENTIFICATION.

Citing CPL Article 710 and the New York and United States Constitutions, Defendant moves to suppress “all identification[s] of the Defendant at trial, or for a hearing” (*see* Point C, Page 2, of Defendant’s Notice of Motion). Specifically, Defendant requests a hearing to determine if the “photo identifications [which occurred on March 10, 2022] were conducted suggestively or improperly and whether they have tainted or will taint any identification of Defendant at any

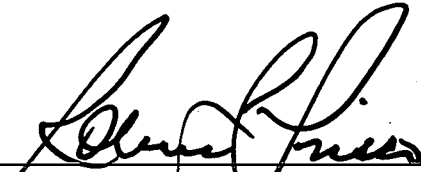
subsequent judicial proceeding” (see Page 2 of Defendant’s Memorandum of Law).

In their response, the People aver that “defendant’s motion to suppress identification evidence should be denied following a hearing pursuant to *United States v Wade*, 388 US 218 [1967] and CPL [§] 710.60 (4) [as] the People will meet their initial burden of proving both the reasonableness of the police conduct and the lack of any undue suggestiveness in any pretrial identification procedure” (see Point C, Page 7, of the People’s Memorandum of Law). The People further contend that “[w]hile there was no undue suggestiveness in the array or procedure employed here, should the Court find otherwise, the People can establish that an in-court identification of defendant should be permitted because the UC has a source from which to identify defendant that is independent of the police procedure” (see Point C, Page 9, of the People’s Memorandum of Law).

Based upon the issues raised by the parties, Defendant’s motion to suppress the identification evidence is granted to the extent that a bifurcated *Wade* hearing will be conducted to determine the admissibility of identification testimony from the undercover officer who is alleged to have previously identified Defendant under the circumstances set forth in the CPL § 710.30 (1) (b) Notice. If the Court determines that the identification of the defendant from the photographic array was unduly suggestive, the People will then have to establish by clear and convincing evidence that any in-court identification is based upon the witness’ independent observation of the defendant (see *People v Goondall*, 173 AD3d 896, 898 [2d Dept 2019], citing *People v Radcliffe*, 273 AD2d 483, 484 [2d Dept 2000]; see *People v Adelman*, 36 AD3d 926, 927 [2d Dept 2007], *lv. denied* 9 NY3d 872 [2007]; *People v Ashe*, 297 AD2d 287 [2d Dept 2002], *lv. denied* 99 NY2d 555 [2002]; *People v Brown*, 293 AD2d 686 [2d Dept 2002], *lv. denied* 98 NY2d 695 [2002]; *People v Hyatt*, 162 AD2d 713, 714 [2d Dept 1990], *lv. denied* 76 NY2d 987 [1990]).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 8, 2022


HONORABLE ROBERT J. PRISCO
County Court Judge

To: HON. MIRIAM E. ROCAH
Westchester County District Attorney
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
Attn: Assistant District Attorney Courtney Johnson

David Channing, Esq.
Attorney for Defendant Dayquan Bailey
a/k/a Dyquan Bailey
75 South Broadway, Suite 431
White Plains, New York 10603