

People v Dixon

2022 NY Slip Op 34939(U)

July 13, 2022

County Court, Westchester County

Docket Number: Indictment No. 22-70807

Judge: George E. Fufidio

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FILED

JUL 14 2022

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

DECISION & ORDER
Indictment No.: 22-70807

CALIL DIXON,

Defendant.

-----X
FUFIDIO, J.

Defendant, CALIL DIXON, having been indicted on or about February 31, 2022 on one count of burglary in the third degree (Penal Law § 140.20), two counts of criminal mischief in the fourth degree (Penal Law § 145.00), two counts of petit larceny (Penal Law § 155.25) and one count of criminal possession of a stolen property in the fifth degree (Penal Law § 165.40) has filed an omnibus motion which consists 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. Upon consideration of these papers, the stenographic transcript of the grand jury minutes this Court disposes of this motion as follows:

A. DISCOVERY ORDER

Pursuant to Administrative Order 393/19, it is:

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case, are required to make timely disclosure of information favorable to the defense as required by *Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]; *People v Geaslen*, 54 NY2d 510 [1981]; and their progeny under the United States and New York State Constitutions and by Rule 3.8(b) of the New York State Rules of Professional Conduct; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or, if the matter is not being prosecuted by the District Attorney, the prosecuting agency and its assigned representatives, have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and are therefore expected to confer with investigative and prosecutorial personnel who acted in the case and to review all files which are directly related to the prosecution or investigation of this case. For purposes of this Order, favorable information can include but is not limited to:

a) Information that impeaches the credibility of a testifying prosecution witness, including

(i) benefits, promises, or inducements, express or tacit, made to a witness by a law enforcement official or law enforcement victim services agency in connection with giving testimony or cooperating in the case;

- (ii) a witness's prior inconsistent statement, written or oral;
 - (iii) a witness's prior convictions and uncharged criminal conduct;
 - (iv) information that tends to show that a witness has a motive to lie to inculcate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution; and
 - (v) information that tends to show impairment of a witness's ability to perceive, recall, or recount relevant events, including impairment resulting from mental or physical illness or substance abuse;
- b) Information that tends to exculpate, reduce the degree of an offense, or support a potential defense to a charged offense;
 - c) Information that tends to mitigate the degree of the defendant's culpability as to a charged offense, or to mitigate punishment;
 - d) Information that tends to undermine evidence of the defendant's identity as a perpetrator of a charged crime, such as a non-identification of the defendant by a witness to a charged crime or an identification or other evidence implicating another person in a manner that tends to cast doubt on the defendant's guilt; and
 - e) Information that could affect in the defendant's favor the ultimate decision on a suppression motion; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent prosecuting the case is hereby advised of his/her duty to disclose favorable information whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is directed that favorable information must be timely disclosed in accordance with the United States and New York State constitutional standards, as well as CPL Article 245. Disclosures are presumptively "timely" if they are completed no later than 30 days before commencement of trial in a felony case and 15 days before commencement of trial in a misdemeanor case. Records of a judgment of conviction or a pending criminal action ordinarily are discoverable within the time frame provided in CPL Article 245. Disclosures that pertain to a suppression hearing are presumptively "timely" if they are made no later than 15 days before the scheduled hearing date; and it is further

ORDERED, that the District Attorney and the Assistant District Attorney responsible for the case or any other agent responsible for the prosecution of the case is hereby reminded and informed that his/her obligation to disclose is a continuing one; and it further

ORDERED, notwithstanding the foregoing, that a prosecutor may apply for a protective order, which may be issued for good cause, and CPL Article 245 shall be deemed to apply, with respect to disclosures required under this Order. Moreover, the prosecutor may request a ruling from the court on the need for disclosure. Only willful and deliberate conduct will constitute a

violation of this Order or be eligible to result in personal sanctions against the prosecutor; and it is further

ORDERED, that counsel for the defendant is required to:

a) confer with the defendant about his/her case and is required to keep the defendant informed about all significant developments in this case; and

b) timely communicate any and all plea offers to the defendant and to provide him/her with reasonable advice about the advantages and disadvantages of any such plea offer including the potential sentencing ranges that apply in the case;

c) where applicable, insure the defendant receives competent advise concerning immigration consequences as required under *Padilla v. Kentucky*, 559 US 356 [2010];

d) perform a reasonable investigation of the facts and the law pertinent to the case (including, as applicable, visiting the scene, interviewing witnesses, subpoenaing pertinent materials, consulting experts, inspecting exhibits, reviewing all discovery materials obtained from the prosecution, researching legal issues, etc.) or, as appropriate, making a reasonable professional judgment not to investigate a particular matter;

e) comply with the requirements of the New York State Rules of Professional Conduct regarding conflicts of interest, and when appropriate, timely notify the court of a possible conflict so that an inquiry may be undertaken or a ruling made;

f) possess or acquire a reasonable knowledge and familiarity with criminal procedural and evidentiary law to ensure constitutionally effective representation in the case; and

g) in accordance with statute, provide notices as specified in CPL sections 250.10, 250.20 and 250.30 (e.g., a demand, intent to introduce the evidence, etc.) as to the defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see, Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). In the event that the People are, or become, aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the court to permit an *in camera* inspection and determination as to whether the material must be disclosed to the defendant.

With respect to the particular allegations made by the Defendant that he has not been provided with specific CPL 245.20(1)(k) material, the Defendant charges that, "The Prosecution has provided 1k questionnaires completed by 23 officers relevant to the alleged offense. The forms provided by 6 of the 24 officers are dated sometime either in 2020 or in 2021 prior to the date of the incident...July 31, 2021...." The six who have not provided updated information are Officers Spink, Simoes, Park, Kudellia, Dolce and Day. The Defendant also alleges that the remaining 17 of the officers, who seemingly did provided updated information, failed to answer

question 6 of the so called 1k questionnaire which asks, “Is the witness aware of any substantial administrative, personnel or civilian complaints implicating the witness’ honesty and integrity?”¹

The People’s position is that, “the express language of CPL 245 does not require the People to make new inquiries involving police personnel records for each new criminal case, or periodically reach out to law enforcement regarding (1)(k) information after filing a certificate of compliance” and instead they rely on the directives of CPL 245.55(1), which requires the People to, “ensure that a flow of information is maintained between the police and other investigative personnel...to place within [their] possession or control all material and information pertinent to the defendant and the offense or offenses charged.”

Regardless of the orders above, we turn towards the extent of discovery required by CPL 245.20(1)(k)(iv) as it pertains to information that would tend to impeach the credibility of testifying police officers. Since the enacting of CPL 245, the People have relied upon what has been called the “1k Questionnaire” as a mechanism for getting from the police information that would tend to impeach their testimony. In the past, the police refused to answer question number 6 contained in that questionnaire. While this is information that in this Court’s estimation cuts right to the heart of the purpose of CPL 245.20(1)(k)(iv), the police, regrettably, argued that this information was protected from disclosure under Civil Rights Law section 50-a and rather than willingly provide that information, they argued that the only way that information could be obtained was by subpoena *duces tecum* for an *in camera* inspection of those documents, only once it had been established there existed a “factual nexus between the requested documents and relevant and exculpatory evidence, as opposed to general impeachment material” (*Matter of Certain Police Officers*, 67 Misc3d 458). This abject refusal to turn this material over to the very agency tasked with actually following through on the arrests made by the various police departments left the People unable to comply with their obligations under CPL Article 245 and required the courts to take creative measures in an attempt to get the police to disclose this information and in turn, potentially put those arrests in jeopardy by invoking at a minimum, the sanctions set forth in CPL 245.80. However, as history will show, in March 2020 the world was and at this writing, still is in the midst of the global COVID-19 pandemic, which had initially halted all but essential court proceedings and coincidentally in June 2020, in response to global protests concerning police brutality and general law enforcement practices, New York State repealed Civil Rights Law section 50-a. What this means is that the police may no longer use Civil Rights Law 50-a as a shield protecting them from disclosing that information to the People in the “1k Questionnaire.” It would also appear, though, that this information is no longer in the *exclusive* control of the police and prosecutors and that the Defendant may be able to obtain this information through the Freedom of Information Laws procedure or by a subpoena. Nevertheless, CPL 245.20 put the burden on the prosecution to obtain and disclose this information, “the prosecution shall disclose to the defendant...all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or person under the prosecution’s direction or control, including but not limited

¹ it is unclear from the Defendant’s papers if the six police officers mentioned also failed to answer that question, however, for purposes of this decision, the Court will assume that they have not either. It is also unclear whether the Defendant meant 23 or 24 police witnesses in total, however that too is irrelevant for purposes of this decision.

to:..." (245.20(1)). The list in CPL 240.20 is not exhaustive and naturally that leads to the contemplation of more liberal disclosure. Once the People have the answers from the questionnaire, assuming that the answer to any of the questions is in the affirmative, the People are then in a position to determine for themselves how to best respond to that information under the law and how to obtain the material from the police personnel files, should they need to, in order to disclose that information to the Defendant. Ironically, in the haste to repeal Civil Rights Law 50-a, the legislature also repealed subdivision 4 of that section which essentially granted prosecutors access to that information in furtherance of their official duties. Furthermore, there is nothing preventing the Defendant from seeking the material on her own in order check the accuracy of what has been disclosed by the People.

The Court agrees with the People that with respect to continually updating the responses to the (1)(k) questionnaire; that scenario is covered by CPL 245.55(1). The nature of complaints against police officers is that it is a continuing process and that each year, indeed each day provides a new opportunity for the previous information that had been provided to become outdated. The Defendant does nothing more than offer speculation that something may have occurred involving any of these 23 (or 24) officers since the People have disclosed what they have under CPL 245.20(1)(k). It would seem to be in the People's best interest that they provide as accurate and updated information as possible and the Defendant is right to be skeptical given that the police, when presented with the opportunity to voluntarily comply with the new discovery statute and do the right thing by it, nonetheless had to be dragged into even basic compliance with CPL 245.20(1)(k). However, given the repeal of Civil Rights Law 50-a, the Defense can access the information it seeks on its own and the court will entertain any defense subpoena for such information. Naturally, it is the People and police who will face the consequences of failing to update that information either through sanctions or on the witness stand.

Next, regarding the Defendant's contention that many, if not all of the police involved in this case have not fully answered the 1k questionnaire, they are now required to do so, especially question 6. That question asks for a yes or no answer, that is, whether *they are aware* of any substantial administrative, personnel or civilian complaints implicating the witness' honesty and integrity. A blank space where an answer should be is not an answer to that binary question. Once that question is answered then the People have again fulfilled their obligation (*Matter of Certain Police Officers*, 67 Misc3d 458 [Westchester County Court, Blackwood, J. February 21, 2020]). Again, if the Defendant feels as though there is something that the People have not disclosed with respect to their police witnesses, with the repeal of New York Civil Rights Law section 50-a, the Defendant has as much ability to get these records from the police as the People do and should they find that there is a discrepancy between what was disclosed and what actually exists, the consequences naturally inure to the People.

Finally, this order notwithstanding, the Court finds that the People have acted in good faith as is required by CPL 245.20(1) by providing the forms to the Defendant as they have, despite not having answers for the 1k questionnaire's question 6 and for the late provision of the grand jury minutes in this case. At this point the Court will not entertain sanctions for the failure

to provide those answers, but the Defendant may revive this branch of his motion should the situation change.

B. MOTION TO STRIKE 710.30 NOTICES

The motion to strike is denied. Said notices are in conformity with the statutory requirements of CPL 710.30 in that they set forth the date, manner, location of the identification procedures employed or the date, location and substance of the statements they intend to offer against the Defendant (*People v Sumter*, 68 AD3d 1701 [4th Dept. 2009][pertaining to identifications]; *People v Lopez*, 84 NY2d 425[1994][pertaining to statements]) and were served in the proper time frame (CPL 710.30). The fact that there was a clerical error as to the year when the noticed statement occurred in one of the CPL 710.30 statement notices is immaterial. The People have, by their answer to this branch of their motion, informed the Defendant of the correct date. Finally, because the Defendant has filed a suppression motion based upon the notices that were served he has waived his right to be heard on the sufficiency of the notices (*People v Kirkland*, 89 NY2d 903 [1996]).

C. MOTION TO SUPPRESS STATEMENTS

The Court grants the Defendant's motion 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 [1980]), 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]).

D. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY CPL ARTICLE 710

The motion to suppress identification testimony is denied. The People have served one CPL 710.30 identification notice on the Defendant. They allege that the noticed identification was made by the arresting officer, during the grand jury presentation, from a photograph that was taken of the Defendant after he was arrested by the same officer while the Defendant was at the Yonkers police headquarters awaiting processing. This is confirmed by the grand jury minutes wherein the following exchange took place with Officer Quinn:

Q: I'm showing you what's been marked as Grand Jury Exhibit 11 for identification. What is that?

A: This is the male suspect.

Q: And how do you know him to be the male suspect? By male suspect, what do you mean?

A: This is Calil Dixon, and this is the suspect that I located in the shipping container.

This was not an identification procedure. The witness was confirming that the person in the picture was the same person that he had arrested after finding him hiding in a shipping container; it was not a selection procedure and the testimony was not sought because the witness had observed the criminal events (*People v Green*, 270 AD2d 566 [3rd Dept. 2000]).

E. MOTION TO SUPPRESS PHYSICAL EVIDENCE

The Court grants the Defendant's motion solely to the extent that *Mapp* and *Dunaway* hearings are directed to be held prior to trial to determine the propriety of any search resulting in the seizure of property (*see, Mapp v Ohio*, 367 US 643 [1961]) and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see, Dunaway v New York*, 442 US 200 [1979]).

F. MOTION TO INSPECT AND THE GRAND JURY MINUTES AND TO DISMISS AND/OR REDUCE THE INDICTMENT

Defendant moves pursuant to CPL §§210.20(1)(b) and (c) to dismiss the indictment, or 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. The Court has reviewed the minutes of the proceedings before the Grand Jury.

Pursuant to CPL §190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's commission thereof (CPL §70.10[1]); *People v Jennings*, 69 NY2d 103 [1986]). "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 Bello*, 92 NY2d 523 (1998); *People v Ackies*, 79 AD3d 1050 (2nd Dept 2010). In rendering a determination, "[t]he reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt." *Bello, supra*, quoting *People v Boampong*, 57 AD3d 794 (2nd Dept 2008-- internal quotations omitted). 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 (see 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 supports a finding 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, that the grand jurors who voted to indict heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298 [1988]; *People v Julius*, 300 AD2d 167 [1st Dept 2002], *lv den* 99 NY2d 655 [2003]). The Grand Jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980] and *People v. Valles*, 62 NY2d 36 [1984]).

In making this determination, the Court does not find that release of such portions of the Grand Jury minutes as have not already been disclosed pursuant to CPL Article 245 to the parties was necessary to assist the Court.

G. MOTION FOR SANDOVAL/VENTIMIGLIA/MOLINEUX HEARING

Granted, solely to the extent that *Sandoval/Ventimiglia/Molineux* hearings, as the case may be, shall be held immediately prior to trial, as follows:

I. Pursuant to CPL §245.20, the People must notify the Defendant; not less than fifteen days prior to the first scheduled date for trial, of all specific instances of Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant, or as substantive proof of any material issue in the case, designating, as the case may be for each act or acts, the intended use (impeachment or substantive proof) for which the act or acts will be offered; and

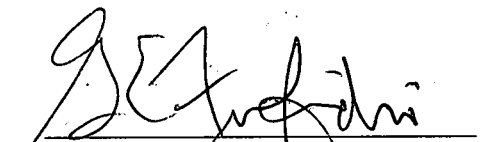
II. Defendant, at the ordered hearing, must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (*see, People v. Malphurs*, 111 AD2d 266 [2nd Dept. 1985]).

H. MOTION RESERVING THE RIGHT TO FILE ADDITIONAL MOTIONS

Defendant's motion reserving the right to file additional motions is denied. Should the Defendant file any other motions that were not raised in his *Omnibus* motion, then they will need to be in compliance with CPL 255.20(3).

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
July 13, 2022


Honorable George E. Fufidio
Westchester County Court Justice

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