

People v McIntosh

2023 NY Slip Op 34819(U)

September 11, 2023

Supreme Court, Westchester County

Docket Number: Ind. No. 70071-23

Judge: Susan M. Capeci

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

DECISION AND ORDER
Ind. #70071-23

-against-

ROBERT MCINTOSH
Defendant.

FILED
AND
ENTERED
ON 9-12 2023
WESTCHESTER
COUNTY CLERK

FILED
SEP 12 2023
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The defendant, charged by indictment with criminal possession of a weapon in the second degree (P.L. 265.03 (1)(b)), criminal possession of a weapon in the third degree (P.L. 265.02 (1)), criminal possession of a firearm (P.L. 265.01-b(1)), attempted assault in the third degree (P.L. 110/120.00 (1)), and menacing in the second degree (P.L. 120.14(1)), makes this omnibus motion seeking: 1) inspection of the grand jury minutes by the Court and the defendant, and thereafter, for the dismissal of the indictment and/or reduction of the charges contained therein, 2) disclosure of Brady material, a bill of particulars, and further discovery; 3) suppression of physical evidence recovered from the defendant's person, his vehicle, or his property, on the ground that such evidence was seized without probable cause, and motion to controvert the search warrant, or motion for a hearing to determine the sufficiency of the affidavit underlying the search warrant pursuant to Franks v Delaware (438 US 154 (1978)); 4) suppression of identification evidence, or a Wade hearing; 5) a Sandoval/Ventimiglia/Molineux hearing; and 6) a reservation of rights to make further motions as necessary.

The People consent to an *in camera* review by the Court of the Grand Jury minutes for legal sufficiency and the release of the grand jury testimony to the

defendant, consent to a Sandoval/Ventimiglia/Molineux hearing, consent to provide Brady material and all discovery required to the defendant, but otherwise oppose the motion. The Court now finds as follows.

1. MOTION TO INSPECT 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).

The defendant contends that the indictment should be dismissed because certain testimony offered before the Grand Jury was based upon hearsay. Specifically, he first contends that a police witness, Det. Carruthers, who offered his testimony as to defendant's pedigree information, had no part in the defendant's arrest or processing, and thus his testimony was inadmissible hearsay. He argues that based upon this claimed hearsay testimony of Det. Carruthers, defendant's certificate of conviction [Grand Jury Exhibit 5], was improperly admitted as a result. The defendant further contends that the supporting documentation underlying the ballistics report, admitted as Grand Jury Exhibit 1A, was also inadmissible hearsay. He contends there was no basis to admit this evidence. The defendant argues that the cumulative effect of these errors impaired the integrity of the Grand Jury proceedings and should result in dismissal of the indictment.

The People respond that Det. Carruthers' testimony was not hearsay because he had first-hand knowledge of defendant's pedigree information since he already interviewed the defendant and obtained this information from him prior to his arrest in this case, as reflected on the Miranda form signed by the defendant. While the People do concede that there was no basis to admit the supporting documentation underlying the ballistics report, as it was inadmissible hearsay, they contend the effect of this was *de minimis* as it was never referred to by a testifying witness and there was nothing prejudicial to the defendant contained in it. They argue that the integrity of the Grand Jury was not impaired as a result.

CPL 210.35(5) provides that a Grand Jury proceeding is defective when “the integrity thereof is impaired and prejudice to the defendant may result.” The exceptional remedy of dismissal is thus warranted only where a defect in the indictment created a possibility of prejudice (see People v Di Falco, 44 NY2d 482 (1978)). This statutory test “is very precise and very high” (People v Darby, 75 NY2d 449, 455 (1990)).

Dismissal of indictments under CPL 210.35(5) should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury. “Certainly, not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment (see, People v Avant, 33 NY2d 265, 271 [citations therein]). Likewise, isolated instances of misconduct will not necessarily impair the integrity of the Grand Jury proceedings or lead to the possibility of prejudice” (People v Huston, 88 NY2d 400, 408–09 (1996)).

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]). The Court further finds that based upon review of the Grand Jury proceedings as a whole, there is no basis upon which to conclude that the prosecutor’s presentation impaired the integrity of the Grand Jury proceeding (see People v Shahzad, 71 AD3d 704, 705–06 (2d Dept 2010); People v Colucci, 32 AD3d 1044, 1045

(2d Dept 2006)). Accordingly, Defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

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]), and that the Grand Jury was properly instructed (see People v Calbud, 49 NY2d 389 [1980] and People v Valles, 62 NY2d 36 [1984]).

In making the above 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.

2. DISCLOSURE OF BRADY MATERIAL/ BILL OF PARTICULARS/ FURTHER DISCOVERY

The People consent to the disclosure of Brady material and are directed to do so in accordance with CPL article 245. Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People. If any items set forth in CPL Article 245 have not already been provided to Defendant pursuant to that Article, said items are to be provided forthwith. Any party is granted leave, if required, to apply for a Protective Order in compliance with CPL Article 245, upon notice to the opposing party and any party affected by said Protective Order.

The People are directed to file a Certificate of Compliance with CPL Article 245 and the instant Order upon completion of their obligations thereunder, if they have not already done so. The People consent to provide any witness statements pursuant to People v Rosario, 9 NY2d 286 (1961)).

The defendant's motion for a bill of particulars is denied as untimely, as he failed to make any such request within thirty days of his arraignment on January 31, 2023. A request for a bill of particulars shall be timely if made within thirty days after arraignment and before the commencement of trial (CPL § 200.95(3)). In any event, the defendant's motion is also denied in light of the specific facts provided in support of the charges, already contained in the indictment and related discovery.

The function of a bill of particulars is to define more specifically the crime charged, or in other words, to clarify the pleading, not to serve as a discovery device (People v Davis, 41 NY2d 678 (1977); People v Kyoung Ja Choi, 259 AD2d 423 (1st Dept 1999)). The indictment/information or bill of particulars must state such specifics "as may be necessary to give the defendant and the court reasonable information as to the nature and character of the crime charged" (People v Morris, 61 NY2d 290, 294 (1984)). Under the circumstances here, the defendant's motion for a bill of particulars is denied, as the indictment and related discovery already provided to him contain reasonable information as to the nature and character of the crimes charged.

3. MOTION TO SUPPRESS PHYSICAL EVIDENCE/ CONTROVERT THE SEARCH WARRANT

The defendant moves to suppress all physical evidence recovered in this case including all items recovered from his home and person. He further moves to controvert the search warrant issued in this case and contends that the affidavit in support of the warrant contained false information. He argues that the officers actually conducted a search of his home prior to obtaining the search warrant, and that this is evident because the officer who obtained the warrant, Det. Vitelli, identified the firearm in his affidavit as being a semi-automatic gun, when the complainant had never identified it as such to the police. He contends that the only way Det. Vitelli could have obtained that information is by a police search conducted of his home prior to obtaining the warrant, and recovery of the gun at that time. Thus, he seeks to controvert the search warrant and suppress all evidence recovered as a result of its issuance.

The People respond that the search warrant was issued based upon ample probable cause. They contend the defendant's residence was entered prior to the issuance of the warrant by police officers solely to conduct a protective sweep for other individuals that may have been present, and that no search or recovery of items took place prior to the issuance of the search warrant. All items of evidence including the gun were recovered pursuant to the validly issued search warrant. The People assert that the defendant's claim his home was searched prior to the issuance of the warrant is mere speculation, and that the complainant was in fact interviewed by Det. Vitelli and told him where the gun was in the home, before he obtained the warrant.

The complainant in this case was interviewed by Det. Vitelli related to this incident on January 26, 2022, in a transcribed interview which concluded at 12:13 pm that day. The transcript of that interview indicates she described the gun used by the defendant during the incident where he is alleged to have menaced her as a "black gun." She also stated she believed he had put the gun in his daughter's room by the bathroom. The search warrant was issued later on that same date at 1:55pm authorizing a search of the defendant's home. In his search warrant affidavit in support of the search warrant, Det. Vitelli described the gun as a "black semi-automatic firearm." The police conducted a search pursuant to the warrant and recovered a black semi-automatic firearm in addition to other items of evidence the defendant now seeks to suppress.

The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, ... and particularly describing the place to be searched, and the ... things to be seized" (US Const Amend. IV). The particularity requirement "prohibit[s] law enforcement agents from undertaking a general exploratory search of a person's belongings" (People v Brown, 96 NY2d 80, 84 (2001)). To meet the particularity requirement, the warrant's directive must be "specific enough to leave no discretion to the executing officer" (People v Darling, 95 NY2d 530, 537 (2000); People v Brown, supra at 84.) "A search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional" (People v Melamed, 178 AD3d 1079, 1081, (2d Dept 2019); People v Williams, 187 AD3d 1222 (2d Dept 2020)).

A search warrant application "must provide the magistrate with information sufficient to support a reasonable belief that evidence of illegal activity will be present at the specific time and place of the search" (People v Edwards, 69 NY2d 814, 816 (1987)). A "presumption of validity" attaches to a warrant issued by an impartial magistrate who has already reviewed information supporting probable cause and found it sufficient (People v Castillo, 80 NY2d 578, 585 (1992)). The evaluation of whether a warrant affidavit is supported by probable cause should be based on all the facts and circumstances viewed together, and the affidavit should not be read in a hypertechnical manner, but viewed in the light of everyday experiences (People v Gramson, 50 AD3d 294 (1st Dept 2008)).

In consideration of the above noted principles, and based upon review of the search warrant and warrant application, the Court finds the search warrant for defendant's home was issued based upon sufficient probable cause. The search warrant affidavit references the sworn statement earlier provided by the complainant.

Further, the Court finds the defendant failed to make the requisite substantial preliminary showing that the warrant was based upon an affidavit containing statements that were knowingly or intentionally false or made with reckless disregard for the truth (see People v Alfinito, 16 NY2d 181, 186 (1965); People v Novick, 293 AD2d 692 (2d Dept 2002); People v Watson, 163 AD3d 855 (2d Dept 2018)). In any event, defendant is not entitled to a Franks/Alfinito (Franks v Delaware, 438 US 154 (1978); People v Alfinito, supra) hearing regardless of whether he met his burden as to those statements, since the remaining statements in the affidavit were sufficient to establish probable

cause (People v Tambe, 71 NY2d 492, 505 [1988]; People v Franklin, 137 AD3d 550, 552–53 (1st Dept 2016); People v Edwards, 191 AD3d 1377 (4th Dept 2021)).

Any doubt as to whether the allegations in the detective's affidavit were perjurious "should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing the warrant" (People v Alfinito, supra at 186; People v Holman, 248 AD2d 637, 638 (2d Dept 1998)). The motion to controvert the search warrants and for suppression with respect to the evidence recovered is denied.

4. MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

The defendant moves to suppress identification evidence contending that his identification from a single photograph was unduly suggestive, or in the alternative seeks a Wade hearing.

As noted by the People, they have not served notice of any identification in this case. The defendant's motion to suppress identification evidence is denied as premature at this time, as the People have not served any CPL 710.30 notice pertaining to an identification or otherwise indicated they are seeking to introduce any such evidence at trial.

5. 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:

A. 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


B. 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]).

6. MOTION FOR RESERVATION OF RIGHTS

The defendant requests leave to make further motions as necessary. The defendant's motion is denied. CPL 255.20 is controlling with respect to the time frame for making pre-trial motions and there have been no allegations of good cause for making further motions outside of those time constraints. Any such request will be considered at the time it is made.

This constitutes the Decision and Order of this Court.

Dated: September 11, 2023
White Plains, New York



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A.J.S.C.

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