

People v Montalvo

2023 NY Slip Op 34930(U)

November 3, 2023

County Court, Westchester County

Docket Number: Indictment No. DA 72097/23

Judge: George E. Fufidio

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
NOV -9 2023
TIMOTHY C. IUDINI
COUNTY CLERK
COUNTY OF WESTCHESTER

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

-against-

JAYCOB MONTALVO,

Defendant.

-----X
FUFIDIO, J.

DECISION & ORDER

Indictment No.: 72007-23

DA 72097/23

Defendant, JAYCOB MONTALVO, having been indicted on or about July 19, 2023, on five counts of criminal possession of a weapon in the second degree (Penal Law §265.03[1](b)(2 counts) and Penal Law §265.03[3](3 counts) and one count of reckless endangerment in the first degree (Penal Law § 120.25), 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 and the evidence presented this Court disposes of this motion as follows:

A. MOTION FOR A BILL OF PARTICULARS

The Defendant's motion for a Bill of Particulars is denied. The Defendant did not request one per CPL §200.95[2]. Moreover, to the extent the within constitutes such a motion, it is denied as untimely (CPL §200.95[3]). Finally, upon the quantity and quality of discovery materials previously provided, consistent with Article 245, the Defendant has ample information around which to construct his defense (CPL 200.95[5]).

B. and I. MOTION FOR DISCOVERY, DISCLOSURE, AND INSPECTION

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.

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 scupper 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.

C. MOTION 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.

D. 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 and the evidence presented to 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]). In particular, the evidence demonstrates that on June 23, 2023 the police recovered a firearm from the Defendant which he was carrying outside his home or place of business and which was loaded with one bullet in the chamber and nine in the magazine. Testing of this weapon was conducted, with ammunition recovered with the weapon, and the weapon fired without incident. Further, the evidence demonstrates that law enforcement officers undertook an investigation subsequent to receiving a report of "shots fired" which revealed that a group of five males present in the area from which the shots hailed. All were shouting. One vandalized a nearby memorial. Video surveillance demonstrates that two members of that group fired shots in the vicinity of 135 Stanley Avenue in Yonkers before all five fled the area together. Defendant was identified as one of the shooters. Upon the evidence adduced, 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]). Further, the Grand Jury was properly instructed including as to in-concert and aiding and abetting activity (see *People v Calbud*, 49 NY2d 389 [1980] and *People v Valles*, 62 NY2d 36 [1984]). Moreover, the prosecutor did not fail to instruct the grand jury on any apparent defense (see, CPL 210.35[5]; *People v Valles*, 62 NY2d 36, 38-39 [1984]).

In making these determinations, the Court does not find release of any additional portions of is necessary to assist the Court. However, as the numbering in the indictment is distinct from the numbering of the charges as presented to the Grand Jury, the Court will entertain an application to amend the indictment, as to this ministerial error such that count six (6) shall become count one (1); count five (5) shall become count two (2); count one (1) shall become count three (3); count two (2) shall become count four (4); count three (3) shall become count five (5); and count four (4) shall become count six (6).

E. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Despite apparent deficiencies in the moving papers with respect to specification of "sworn allegations of fact", in the interest of justice, upon the facts and information known to it, this Court directs that a *Mapp/Dunaway* hearing to be conducted prior to trial to determine the propriety of the search resulting in the seizure of any evidence from the Defendant's person and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (see, *Dunaway v New York*, 442 US 200 [1979]; *Mapp v. Ohio*, 367 US 643 [1961]).

As to any evidence recovered by law enforcement with respect to its investigation into events alleged to have occurred on June 17, 2023, the Court finds that the Defendant lacks standing with respect to the areas from which any physical evidence may have been recovered (see generally, *Rakas v Illinois*, 439 US 128 [1978]; *People v Ramirez-Portoreal*, 88 NY2d 99 [1966]; *People v Ponder*, 54 NY2d 160 [1981]; *People v White*, 153 AD3d 1369 [2d Dept 2017]; *People v. Hawkins*, 262 AD2d 423 [2d Dept 1999]).

F. 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 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]).

G. MOTION FOR PRE-TRIAL VOLUNTARINESS HEARINGS

A lack of notice pursuant to CPL §710.30(1)(a) does not foreclose the use of all statements by the prosecution. Statements constituting *res gestae*, which are spontaneous, made to a co-defendant, overheard by law enforcement, made to private individuals, during testimony before a grand jury, and pedigree statements do not require that a notice pursuant to CPL § 710.30(1)(a) be served to allow the People to use such statements on their case in chief. In the event the People intend to offer evidence of statements for purposes of cross-examination or rebuttal, Defendant shall be entitled to a hearing to test the voluntary nature of such statement.

H. MOTION TO PRECLUDE

Defendant's motion to preclude evidence of statements or identification based on the People not having filed notice in accordance with CPL §710.30[1] is granted except as to any statements or identification evidence for which the People can establish good cause for having failed to provide timely notice (CPL §710.30[2]). Further, this Court notes that lack of notice pursuant to CPL §710.30(1)(a) does not foreclose the use of all statements by the prosecution. Statements constituting *res gestae*, which are spontaneous, made to a co-defendant, overheard by law enforcement, made to private individuals, during testimony before a grand jury, and pedigree statements do not require that a notice pursuant to CPL § 710.30(1)(a).

J. 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

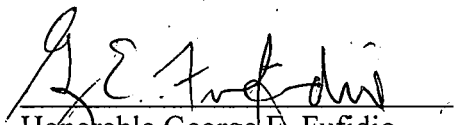
II. Defendant, at the ordered hearing, must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (see, *People v. Malphurs*, 111 AD2d 266 [2nd Dept. 1985]).

K. 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.

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

Dated: White Plains, New York
November 3, 2023


Honorable George E. Fufidio
Westchester County Court Justice

To:

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