

People v Clarke

2024 NY Slip Op 34782(U)

February 29, 2024

Supreme Court, Westchester County

Docket Number: Indictment No. 23-73208

Judge: Anne E. Minihan

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SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON 3-1-2024
WESTCHESTER
COUNTY CLERK

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

FILED

-against-

MAR 06 2024

JERMAINE CLARKE

TIMOTHY J. BROWN
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

DECISION & ORDER
Indictment No. 23-73208

-----X
MINIHAN, J.

Defendant, Jermaine Clarke, is charged by Westchester County Indictment Number 23-73208 with Attempted Murder in the Second Degree (Penal Law § 110/125.25[1]), Assault in the First Degree (Penal Law § 120.10[1]), Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]); and Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[1]).¹

Defendant filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and attached exhibits. Subsequently, he filed a Supplemental Motion to controvert the search warrant issued (McCarty, J.) on December 1, 2023. In response, the People filed an Affirmation in Opposition together with a Memorandum of Law. Defendant then filed a Reply.

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 charged against him, 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 (*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

¹ By Special Information attached to the Indictment, defendant is alleged to have been previously convicted of the crime of Petit Larceny (Penal Law § 155.25) on or about August 9, 2016 in the City Court of Mount Vernon. However, that was the date of defendant’s sentence. He was convicted on April 11, 2016.

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]). Here, the evidence presented, if accepted as true, is legally sufficient to establish every element of the offenses charged (CPL 210.30[2]).

Defendant contends that the victim spoke with members of the Mount Vernon Police Department on multiple occasions after the incident and told them that he did not see who shot him and that an “unknown” male shot him. It took approximately one week for the victim to tell police it was defendant who shot him. The victim testified before the Grand Jury that when he walked into the yard, he saw defendant, who he had known for one year, sitting in a chair, remove a gun from his jacket, and begin to shoot at victim.² Defendant argues that because the earlier conversations with police were not elicited before the Grand Jury, the indictment should be dismissed for failure to present this exculpatory material. However, as defendant concedes, it is not incumbent on the prosecutor to submit all exculpatory evidence to the Grand Jury (*People v Goldstein*, 73 AD3d 946, 948 [2d Dept 2010] [holding the prosecutor must disclose exculpatory defenses which have the “potential for eliminating a needless or unfounded prosecution”]; *People v Lancaster*, 69 NY2d 20, 25-26 [1986] [holding the People are not obligated to present all evidence that is favorable to the accused “even though such information undeniably would allow the Grand Jury to make a more informed determination”]). As such, the Court denies defendant’s motion to dismiss on this ground.

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 reveals that a quorum of the grand jurors was present during the presentation of evidence and that the Assistant District Attorney properly and clearly 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]).

To the extent that defendant’s motion seeks disclosure of portions of the Grand Jury minutes beyond the disclosure directed by CPL Article 245, such as the prosecutor’s instructions and/or colloquies, the Court denies that branch of the motion.

II.

MOTION for DISMISSAL in the INTEREST of JUSTICE

Defendant’s motion to dismiss the indictment pursuant to CPL 210.40 in furtherance of justice is denied. Defendant has provided no evidence in support of his motion nor cited any persuasive or compelling factor, consideration, or circumstance under CPL 210.0 warranting

² It is necessary for the Court to discuss specific testimony from the Grand Jury proceeding in deciding the instant motion (see CPL 190.25[4]).

dismissal of this indictment. In reaching a decision on the motion, this Court has examined the factors listed in CPL 210.40, which include the seriousness and circumstances of the offense; the extent of harm caused by the offense; the evidence of guilt; the history, character and condition of defendant; any exceptionally serious misconduct of law enforcement personnel; the purpose and effect of imposing upon defendant a sentence authorized for the charged offenses; the potential impact of a dismissal on public confidence in the judicial system; the potential impact of dismissal upon the safety and welfare of the community; and other relevant facts suggesting that a conviction would not serve a useful purpose. Having done so, the Court has discerned no compelling factor, consideration, or circumstance which clearly demonstrates that further prosecution or conviction of defendant would constitute or result in injustice.

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 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 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 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 People filed notice within their answer indicating that during cross-examination of defendant, they seek to introduce evidence of two prior convictions. 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. 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]).

If the People determine that they will seek to introduce evidence at trial of any prior uncharged misconduct and criminal acts of 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 SUPPRESS PHYSICAL EVIDENCE
and MOTION to CONTROVERT SEARCH WARRANT

This branch of 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 from defendant, such as his cellular telephone (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing

will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

Defendant also moves this Court to controvert the search warrant issued (McCarty, J.) for the search of his cellular telephone and to suppress conversations therein between him and his wife as protected by the spousal privilege. To the extent that defendant has standing to contest any property seized pursuant to the search warrant, and to the extent that defendant challenges the sufficiency of the search warrant, that argument fails. The results of a search conducted pursuant to a facially sufficient search warrant are not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). The Fourth Amendment to the United States Constitution provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Article I § 12 of the New York State Constitution contains identical language. “A search warrant must be supported by evidence establishing probable cause to believe that an offense has been or is being committed, or that evidence of criminality may be found in a certain place” (*People v Londono*, 148 AD2d 753 [2d Dept 1989]). Consistent with the constitutional provisions, CPL 690.45(4) requires that when a search warrant authorizes the seizure of property, the warrant must include “[a] description of the property which is the subject of the search.” “To meet the particularity requirement, the warrant must be specific enough to leave no discretion to the police” (*see People v Cahill*, 2 NY3d 14, 41 [2003]). This Court recognizes the “strong judicial preferences for search warrants” (*People v Leggio*, 84 AD3d 1116, 1117 [2d Dept 2011]). Upon review of the four corners of the search warrant affidavit, the warrant was adequately supported by probable cause, and sufficiently particular as to the places to be searched and the things to be seized. The search warrant authorized examination of defendant’s phone with a timeframe limitation and date restriction (*see People v Perez*, 72 Misc 3d 310 [Sup Ct, Kings County, 2021] [finding the search warrant for a cell phone overbroad where there was no connection between the phone and the alleged crime and when it allowed for a temporally unlimited search of seemingly every component of the phone]). Moreover, the affidavit sufficiently provided probable cause to search specific areas of defendant’s phone in which incriminatory evidence might be found and the affidavit explained that although this was not the phone that defendant had with him on the date of the incident, there was reason to believe that the information contained therein would be the same information as contained on the phone he had on the date of the incident if data was imported to the new phone. The affidavit also explained the connection between that specific phone, GPS location information, and evidence of defendant’s attempts to avoid police apprehension. As such, the Court finds that the search warrant was sufficiently specific. The Court has also reviewed the order and finds it proper. Based on the foregoing, defendant’s motion to controvert the search warrant is denied.

Defendant’s claim that conversations between him and his wife should be suppressed based on the spousal privilege is premature. First, the People argue that the conversations are between defendant and a female believed to be his girlfriend, not his legal wife. Moreover, they contend that defendant himself, in one of the messages, tells her that he wants her to be his wife, thereby confirming that they are not married. If the People seek to use these conversations at trial, during the pretrial hearings, the trial court is to decide whether these communications are admissible or protected under the spousal privilege.

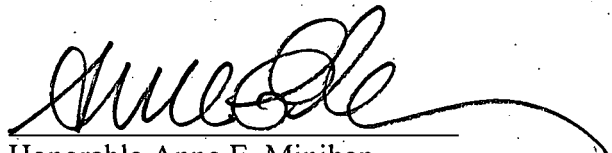
V.

COURT ORDERED WADE HEARING

Pursuant to CPL § 710.30(1)(b), the People served defendant with notice of three alleged identifications made of him. The Court orders a *Wade* hearing (*see United States v Wade*, 388 US 218 [1967]) at which 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, 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. The hearing will address whether the witnesses had a sufficient prior familiarity with defendant as to render them impervious to police suggestion (*see People v Rodriguez*, 79 NY2d 445 [1992]).

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 29, 2024



Honorable Anne E. Minihan
Justice of the Supreme Court

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