People v Tabakman
2009 NY Slip Op 33389(U)
November 23, 2009
Sup Ct, New York County
Docket Number: 843/2008
Judge: Rena K. Uviller

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ROMAN TABAKMAN,
EAST SIDE NEURO DIAGNOSTICS, P.C.,
ROMAN MEDICAL SERVICES, P.C., et al.

Defendants.

Indictment No.
843/2008

DECISION AND ORDER

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R. UVILLER, J.:

Defendant Roman Tabakman is one of twenty-one individuals and corporations charged with Enterprise Corruption, Scheme to Defraud and First Degree Grand Larceny. He is also charged with Second Degree Money Laundering, Insurance Fraud, and Falsifying Business Records all in connection with his participation in an alleged criminal enterprise, the St. Nicholas Group. He moves to dismiss the indictment as unsupported by legally sufficient evidence. In reviewing the sufficiency of evidence before a Grand Jury, the Court must consider 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 a conviction." People v. Swamp, 84 NY2d 725, 730.

The Grand Jury heard evidence that defendant Roman Tabakman, a licenced physician, worked at the St. Nicholas Group, a no-fault medical clinic; that over a five-year period, between September 1, 2002, and September 30, 2007, the clinic operated illegally under New York State law, in that co-defendant Gregory Vinarsky, a non-physician, managed the clinic and controlled patient

treatment.[1] St. Nicholas also employed other physicians, acupuncturists, chiropractors, technicians and other support personnel.

Evidence was adduced that over the five-year period the St. Nicholas Group arranged fake automobile accidents and then submitted to various insurance companies, numerous fraudulent bills for testing and treatment of these "patients." In regard to individuals with real injuries from real accidents, bills for testing and treatment that wither were not provided or were medically unnecessary, were also submitted for reimbursement; the foregoing activity enabled defendant Tabakman and various co-defendants to defraud insurance carriers in excess of six million dollars.

Enterprise Corruption and Scheme to Defraud Counts

A person is "guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he . . . intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity." Penal Law §460.20[1][a].

A pattern of criminal activity required to establish enterprise corruption means conduct "constituting three or more criminal acts that . . . are neither isolated incidents, nor so closely related and connected in point of time or circumstance or commission as to constitute a criminal offense or criminal transaction...." Penal Law §460.10[4][b].

A criminal transaction is defined as "conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture." Criminal Procedure Law §40.10[2].

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[1] See, Business Corporation Law §§1503;1504; Public Health Law §2801-a; Education Law §6512-6514

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[1] See, Business Corporation Law §§1503;1504; Public Health Law §2801-a; Education Law §6512-6514

The Grand Jury heard testimony and received documentary evidence that during the five year period defendant Tabakman personally, or acting as an accomplice to other co-defendants, (i) held out the St. Nicholas Group to be operating legally, whereas in fact it was operating in violation of New York State law; (ii) engaged "runners" to stage automobile accidents and to bring their uninjured passengers to the clinic for treatment; (iii) directed the clinic's employees to bill for tests, procedures and other treatments for those "patients" as well as for people who were injured in real accidents but were either never treated or treated unnecessarily; (iv) falsified records regarding patient testing and treatment for submission to insurance carriers in support of fraudulent claims to facilitate the criminal scheme; and (v) repeatedly obtained reimbursement from insurance carriers under New York's no-fault insurance law for unperformed or unnecessary services.

Sufficient evidence was thus adduced to establish a common goal of the acts, to wit, defrauding insurance companies for monetary gain; and that as a medical clinic, the criminal enterprise had an ascertainable structure, apart from a pattern of criminal activity, with a system of authority that included managers, professional employees and administrative workers that enabled its members to commit a pattern of criminal activity.

Further, the criminal enterprise was not dependent on the commission of any particular criminal act and did not depend upon any particular criminal transaction or the defrauding of one particular insurance company. It did not exist simply or solely for the purpose of committing one or a few of the alleged criminal acts. Rather, that the St. Nicholas enterprise was involved in a continuous and ongoing pattern of criminal activity over a five year period, with no pre-planned termination date.

The 95 individual criminal acts alleged in the indictment satisfy the statutory requirements of timeliness, continuity and relationship, sufficient to create a pattern of criminal activity with the common purpose of profiting by defrauding no-fault insurance carriers.

The evidence further demonstrated that defendant Tabakman had knowledge of the criminal enterprise and the nature of its criminal activities and, with intent to participate in or advance the affairs of the enterprise, he personally committed or was otherwise criminally liable for the acts alleged in the indictment. Knowledge may be established by either direct or circumstantial evidence. People v. Zorcik, 67 NY2d 670.

Whether he personally engaged in each of the 95 criminal acts alleged in the indictment is irrelevant. A member of the enterprise need not participate in all of the enterprise's activities, or even have knowledge of them, as long as he or he is aware of the basic structure and purpose of the enterprise and engages in the requisite number of acts as part of the pattern. Penal Law §§460.10(4); 460.10(1)(a); 460.20(2). See, People v. Canterella, 160 Misc.2d 8, 14; People v. Wakefield Financial Corporation, 155 Misc.2d 775, 785; People v. Pustilnik, 14 Misc.3d 1237A (N.Y. Sup. Ct., March 1, 2007, R. Hayes, J.). See also, United States v. Young, 906 F.2d 615, 619-620; United States v. Mitchell, 777 F.2d 248, 260, *cert. denied*, 476 U.S. 1184; United States v. Cagnina, 697 F.2d 915, 920-922, *cert. denied*, 464 U.S. 856.

Based on the foregoing, sufficient *prima facie* evidence was adduced to support both the count of Enterprise Corruption, as well as the count of Scheme to Defraud with regard to defendant Roman Tabakman.

First Degree Grand Larceny

With respect to the two counts of First Degree Grand Larceny, the Grand Jury was properly instructed and sufficient evidence was adduced to establish each element of the crimes. The amount totaled an excess of one million dollars.

In as much as the St. Nicholas Group was operating in violation of State law, any reimbursement it received from the insurance carriers was illegally obtained and the amount received exceeded one million dollars.

Second Degree Money Laundering

Sufficient evidence was adduced that in excess of one hundred thousand dollars was paid by insurance carriers directly to defendant Tabakman and to his corporate entities, East Side Neuro Diagnostics, P.C., and Roman Medical Services, P.C., and that in excess of one hundred thousand dollars was subsequently transferred to co-defendant Vinarsky, the non-physician manager of St. Nicholas and Vinarsky controlled corporations, in order to launder the proceeds of the alleged criminal conduct to conceal the nature, location, source, ownership and control of the proceeds of the St. Nicholas clinic.

Defendant's reliance on United States v. Santos, __ U.S. __, 128 S. Ct. 2020 (2008), a plurality decision, is misplaced.[2] Subsequent to Santos the United States Supreme Court and other federal courts have limited the precedential effect of that case to its facts, which involved an illegal gambling operation, and not to money laundering arising from non-gambling operations. People v. Howard, 2009 U.S. App. LEXIS 1716 (4th Cir. 2009); United States v. Fleming, 2008 U.S. App. LEXIS 17737 (3rd Cir. 2008); United States v. Peters, 2009 U.S. Dist. LEXIS 22451 (W.D.N.Y 2009); Gotti v. United States, 2009 U.S. Dist. LEXIS 6018 (E.D.N.Y. 2009); United States v. Catapano, 2008 U.S. Dist. LEXIS 79622 (E.D.N.Y. 2008); United States v. Prince, 2008 U.S. Dist. LEXIS 91265 (W.D. Tenn. 2008); Bull v. United States, 2008 U.S. Dist. LEXIS 100764 (C.D. Cal 2008); People v. Posner, Sup. Ct. N.Y. County (June 11, 2009, M. Obus, J.).

Insurance Fraud and Falsifying Business Records

The Grand Jury reviewed documents submitted to insurance carries for "patients" involved in fake accidents and for real no-fault patients for whom either unnecessary, exaggerated or no treatment was performed. or exaggerated treatment was billed.

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[2]The question raised in Santos, which involved an illegal lottery, was whether the term "proceeds" in the federal money laundering statute means "profits" as opposed to "receipts."

The insurance companies, relying upon the information received from the St. Nicholas Group, processed the claims and made payment thereon based upon these allegedly fraudulent documents. These documents became business records of those companies. See, People v. Weinfeld, 65 AD2d 911, *lv denied* 46 NY2d 846; People v. Linardos, 104 Misc.2d 56; People v. Dove, 15 Misc.3d 1134A. See also, People v. Bloomfield, 6 NY3d 165; People v. Marasa, 32 AD3d 369; People v. Coe, 71 NY2d 852.

The totality of the evidence before the Grand Jury was sufficient to establish that the defendant, acting-in-concert with various co-defendants, had knowledge of, and participated in, the submission of these claims to the insurance carriers.

The Grand Jury proceeding was not otherwise defective or impaired. The defendant's request for release and inspection the Grand Jury minutes is **denied**.

To the extent defendant has moved to dismiss the indictment on unspecified grounds raised by various co-defendants, that motion is also **denied**.

Motion to Dismiss Pursuant to CPL §30.10(2)(d)

The conduct charged in the indictment was part of a course of conduct. When an indictment charges a course of conduct, the indictment is timely if the conduct continued to a date within the statute of limitations. In the instant case the indictment was filed on February 22, 2008. Any charged conduct that was still continuing on February 23, 2008, is therefore timely. The date of the final act of the series of acts that comprise the course of conduct, is thus the date from which timeliness is measured.

Since the final act alleged in defendant Tabakman's course of conduct occurred within the five year statute of limitations, the defendant's motion to dismiss on that ground is **denied**.

Motion to Suppress Tangible Property and/or to Controvert the Search Warrant

The property was recovered from the St. Nicholas clinic pursuant to a search warrant. The warrant and underlying affidavit have been examined *in camera*. They are not perjurious on their face and were validly issued upon probable cause. Defendant's bare boned claim of insufficient probable cause for the issuance is without merit. See, People v. Glen, 30 NY2d 252, 262; People v. Christian, 248 AD2d 960, *lv denied* 91 NY2d 1006; People v. Clark, 28 AD3d 1231, *lv denied* 6 NY3d 895; People v. Sanchez-Reyes, 172 AD2d 1034, *lv denied* 78 NY2d 926; People v. Johnson, 154 AD2d 932, *lv denied* 75 NY2d 771. He fails to set forth any sworn allegations of fact which create a factual dispute that would require a hearing, or that contradict information provided to him in the Voluntary Disclosure Form, Bill of Particulars and in the detailed Indictment. CPL §710.60[3][b]; People v. Jones, 95 NY2d 721; People v. Mendoza, 82 NY2d 415, 430; People v. McDowell, 30 AD2d 160, *lv denied* 7 NY3d 850; People v. Arokium, 33 AD3d 458; People v. Scott, 44 AD3d 427; People v. Cambridge, 42 AD3d 350; People v. Thomason, 37 AD3d 304; People v. Long, 36 AD3d 132. *lv denied* 8 NY2d 1014.

Further, defendant has not alleged factual allegations to establish an expectation of privacy in the premises searched. People v. Donaldson, 209 AD2d 633, *lv denied* 84 NY2d 1030 (employee of commercial establishment lacks standing to challenge search thereof); People v. Norberg, 136 Misc.2d 550. People v. Ramirez-Portoreal, 88 NY2d 99, 108; People v. Ponder, 54 NY2d 160; People v. Wesley, 73 NY2d 351;See, People v. Wesley, 73 NY2d 353; People v. Villanueva, 161 AD2d 552; People v. Geraghty, 212 AD2d 358.

Even if he did have a privacy interest in the premises he has failed to assert with any particularity that the supporting affidavit is perjurious or made with a reckless disregard for truth. See, Franks v. Delaware, 438 U.S.154; People v. Tambe, 71 NY2d 492,504; People v. Rayner, 171 AD2d 820, *lv denied* 78 NY2d 972.

His further claim that the search warrant is overbroad and lacks particularity is without merit and is factually unsupported. The warrant application contained reliable facts, explained in detail the property subject to seizure, and was not over broad in terms of the documents sought. In light of the extensive enterprise in which the People contend the defendants were engaged, it would not have been practicable to identify the records and documents that related exclusively to the allegedly illegal activities of the St. Nicholas Group. See, People v. Couser, 303 AD2d 981; People v. Hulsen, 178 AD2d 189; United States Postal Service v. C.E.C. Services, 869 F.2d 184 (2nd Cir. 1989).

Accordingly, the motion to suppress physical evidence and to controvert the search warrant are **denied**, without a hearing.

Motion to Sever

Defendant moves to sever his case from the co-defendants, claiming that because his participation in the enterprise was allegedly relatively minor, he will be prejudiced by the extensive amount of evidence to be introduced against the co-defendants.

The decision to sever rests in the sound discretion of the trial judge. CPL §200.20(3); People v. Mahboubian, 74 NY2d 174; People v. Watts, 159 AD2d 740. Strong public policy concerns favor the joinder of co-defendants when, as here, proof against the defendant is provided by the same evidence required for a co-defendant or defendants. People v. Mahboubian, supra; People v. Caldwell, 78 NY2d 996; People v. Bornholdt, 33 NY2d 75, 87. In such situations, "only the most cogent reasons warrant a severance." People v. Bornholdt, 33 NY2d 75. Any potential prejudice to defendant from a joint trial can be addressed by proper limiting instructions to the jury.

Accordingly, the motion to sever is **denied**.

Motion to Preclude Prior Bad Acts

The defendant's motion to preclude is denied. However, a Sandoval hearing is **granted** and shall be held by the trial court immediately prior to jury selection.

Brady Material

The People are reminded of their continuing obligation under Brady v. Maryland (373 U.S. 83). The defendant is directed to comply with the People's reciprocal demand for discovery. If the defendant objects to any part of the People's demand, he shall make a written objection and submit such to the Court within ten days of the service of a copy of this Decision and Order.

Application to File Additional Motions

The defendant's application to file additional motions is **denied** without prejudice and with leave to renew upon a showing of the necessity for renewal. CPL §255.20(3).

This constitutes the Decision and Order of this Court.

DATED: November 23, 2009

Rena K. Uviller

RENA K. UVILLER, J.S.C.

PEOPLE: ADA Michael Ohm
ADA Andrew Seewald

DEFENSE: Mark Furman, Esq.