

People v DiSalvo

2017 NY Slip Op 30632(U)

March 10, 2017

County Court, Westchester County

Docket Number: 16-0235-02

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
-----X
THE PEOPLE OF THE STATE OF NEW YORK

FILED
AND ENTERED
ON 3-13 2017
WESTCHESTER

-against-

DECISION & ORDER
Indictment No.: 16-0235-02

STEPHEN DiSALVO,
Defendant.
-----X
MINIHAN, J.

FILED
MAR 13 2017
TIMOTHY C. DONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, STEPHEN DiSALVO, was indicted on or about November 15, 2016, Westchester County Indictment Number 16-0235-02 and charged with grand larceny in the first degree (Penal Law § 155.42); grand larceny in the second degree (Penal Law § 155.40 [1]) (3 counts); grand larceny in the third degree (Penal Law § 155.35 [1]) (9 counts); grand larceny in the fourth degree (Penal Law § 155.30 [1]) (3 counts); petit larceny (Penal Law § 155.25) (4 counts); forgery in the second degree (Penal Law § 170.10 [1]) (19 counts); and a scheme to defraud in the first degree (Penal Law § 190.65 [1]). The defendant has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and a Memorandum of Law. The People have filed an Affirmation in Opposition together with a Memorandum of Law. The defendant filed a reply Memorandum of Law. Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order entered in this case, this Court disposes of this motion as follows:

I.

**MOTION for a HEARING to DETERMINE WHETHER the INDICTMENT
WAS the OBTAINED by ATTORNEY MISCONDUCT**

Defendant moves to dismiss the indictment pursuant to CPL 210.35 (5), 210.20 and 210.40 and alternatively seeks a hearing to determine whether dismissal or suppression of evidence is appropriate on the ground that the People allegedly obtained in the instant indictment in part through what he characterizes as the exploitative cooperation of Christopher Leggio, the defendant's alleged coconspirator who is represented by Andrew Quinn, Esq., who represented the defendant's as defense counsel in another criminal matter some 17 years ago (*People v DiSalvo*, Indictment Number 99-0660). Defendant maintains that the People, aware of the conflict of interest, encouraged and exploited Mr. Quinn's violation of his duty to the defendant as his former client under the Rules of Professional Conduct (22 NYCRR 1200.0, Rule 1.9) to obtain the indictment and that the egregiousness of the People's unethical conduct to that end rises to the level of a violation of the defendant's rights under the Sixth Amendment.

The defendant was indicted and subsequently convicted after trial for grand larceny in the second degree related to events occurring between 1991 and 1997 in which the defendant, through the license to haul solid waste issued to A&S DiSalvo Company, commingled municipal

residential solid waste with commercial solid waste, fraudulently increasing the tonnage of waste dumped and thereafter billed to the Town of Ossining by fraudulent “dump tickets” (*People v DiSalvo and A&S DiSalvo Co., Inc.*, 284 AD2d 547 [2d Dept 2001]). Andrew Quinn, Esq. represented the corporate defendant and Mr. DiSalvo during this prosecution. In 2003, following an unsuccessful appeal of the Solid Waste Commission’s denial A&S DiSalvo Company’s renewal application for its solid waste hauling license, the defendant sold the company’s trucks and equipment to ATNM Corp., which was owned in part by Christopher Leggio.

More than ten years later, the People commenced an investigation into whether ATNM Corp., was overcharging customers. Pursuant to that investigation, eavesdropping warrants were authorized as to a Verizon Wireless account related to Christopher Leggio’s cellular phone number as well as two telephone numbers related to ATNM facsimile lines. Subsequent orders were issued authorizing the extension of eavesdropping on these numbers as well as an additional number related to ATNM Corp.’s land line telephone number. These warrants, their respective applications and the extension order were all sealed by the issuing court (Warhit, J.). Thereafter, search warrants were issued in Westchester County authorizing the search of ATNM Corp., the Leggio residence, a vehicle belonging to Mr. Leggio, certain transfer and weigh stations in Westchester County and in Volusia County, Florida authorizing the search of the defendant’s residence. The applications for these search warrants were both sealed.

In November 2015, defendant and Christopher Leggio were arrested on charges related to the events giving rise to this indictment. Defendant retained his current attorney, Mr. Richman to represent him and Mr. Leggio retained Andrew Quinn, Esq., who had previously represented defendant in connection with the prior prosecution under Indictment 99-0660.

Mr. Richman states in his attorney affirmation that once he was retained by the defendant, he met and “agreed to work cooperatively with [Mr. Quinn] in a privileged manner, to jointly benefit [their respective] clients.” Mr. Richman further affirms that at the defendant’s arraignment in December 2016 he first learned that Mr. Quinn had encouraged Mr. Leggio’s cooperation with the District Attorney’s Office in order that Mr. Leggio might receive leniency in his own prosecution. The defendant maintains that Mr. Quinn’s actions to that end, violated the continued duty of loyalty that he owed to him under the New York Rules of Professional Conduct (22 NYCRR 1200.0, Rule 1.9¹) and the American Bar Association’s Standards related

¹Rule 1.9 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0), entitled “Duties to Former Clients,” provides as follows:

“(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing” (Rule 1.9 [a]).

A party seeking disqualification of its adversary’s counsel based on such counsel’s purported prior representation of that party must establish: “(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse” (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130–131 [1996]). Although this court is not making a determination with regard to any

to the Administration of Justice (Standard 3-1.2[b] and [c]²). Since the Office of the District Attorney of Westchester County had previously prosecuted the defendant when he was represented by Mr. Quinn, the People knew that the defendant had been Mr. Quinn's client and that they capitalized upon this prior relationship between Mr. Quinn and the defendant to the detriment of the defendant in this prosecution.

While Mr. Richman concedes not knowing what was discussed in meetings between Mr. Quinn, Mr. Leggio and members of the District Attorney's Office, he points to the cooperation agreement entered into between Mr. Leggio and the People whereby Mr. Leggio agreed to plead guilty and to cooperate against the defendant as evidence that the People acted improperly by working with Mr. Quinn who negotiated the cooperation agreement on Mr. Leggio's behalf to the defendant's detriment. The defendant maintains that the People overreached their own ethical duties by exploiting Mr. Quinn's ethical violation, and that they continued to interview Mr. Leggio and to elicit his testimony before the Grand Jury that indicted the defendant. He asserts that the People, knowing of Mr. Quinn's conflict, should have refused to negotiate a cooperation agreement with him and should have advised the court and requested a conflict hearing.

The defendant would have the court order a hearing now to determine the nature and extent of the People's misconduct and to grant the appropriate relief, which he contends is dismissal. As to Mr. Quinn's representation of Mr. Leggio, the defendant also requests a hearing to determine the nature of the conflict, whether the conflict consisted solely of the representation of an alleged co-conspirator after having represented him or if perhaps Mr. Quinn disclosed confidential information obtained from the defendant (or capitalized on Mr. Leggio's behalf upon the exploitation of information which he was duty bound to keep confidential), when and to what extent the People became actually aware of the conflict and precisely how the People manipulated, exploited and benefitted from the conflict both during the investigation and subsequent presentation of this matter to the grand jury.

The People oppose the defendant's motion in its entirety and argue that the defendant's claims are speculative and that his motion should be summarily denied. They assert that no evidence of a post-accusatory statement by the defendant to any third party was adduced before the grand jury and that, in fact, since the defendant's arraignment on the felony complaint, they have not asked any witness to speak to the defendant. The People maintain that the Criminal Procedure Law does not authorize exclusion or suppression of evidence, much less dismissal of the indictment, on the ground that evidence was procured in violation of attorney ethics rules, and that there is no controlling case law to suggest otherwise. Even assuming *arguendo* that

ethical violations as it is not the appropriate forum, defendant's prior conviction occurred more than 17 years ago and that case appears not have involved Leggio whatsoever.

²Standard 3- 1.2 "The Function of the Prosecutor" states:

"(a) the office of prosecutor is charged with responsibility for prosecutions in its jurisdiction; (b) the prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions; and (c) the duty of the prosecutor is to seek justice, not merely to convict..." (Standard 3- 1.2[a]-[c]).

evidence derived from an attorney ethical violation were procured by the People and used to secure the indictment, none of the remedies sought by the defendant are, the People argue, available under law and thus, his motion should be summarily denied.

By reply, the defendant argues that dismissal or reduction of the indictment is not the only remedy it seeks and suggests suppression of Leggio's trial testimony, disqualification of Mr. Quinn from further representing Leggio and an order granting a hearing to determine the scope of the alleged taint resulting from Mr. Quinn's representation.

Although a court may dismiss an indictment where constitutional rights of a defendant have been invaded, (*People v Glen*, 173 NY 395 [1903]), this defendant has not demonstrated a violation pursuant to the 6th Amendment of the United States Constitution (*see e.g. Brown v Blumenfeld*, 103 AD3d 45 [2d Dept 2012]). Due process imposes upon the People a "duty of fair dealing to the accused and candor to the courts," and thus, they are required "not only to seek convictions but also to see that justice is done" (*People v Pelchat*, 62 NY2d 97, 105 [1984]). This duty applies as to the prosecutor's submission of evidence (*People v Lancaster*, 69 NY2d 20 [1986]). Defendant's motion for dismissal of the indictment under CPL 210.35(5) "must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Sheltray*, 244 AD2d 854, 855, *lv denied*, 91 NY2d 897 [1998]; *see also People v Huston*, 88 NY2d 400, 409 [1996]; *People v Weiss*, 176 Misc.2d 496 [NY Co 1998]) (The People's unethical misconduct did not establish the systematic pattern of ethical violations which would warrant dismissal of indictment). As the Court of Appeals has stated, "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" (*Huston*, 88 NY2d at 409; *see also People v Butcher*, 11 AD3d 956, 958 *lv denied*, 3 NY3d 755 [2004]).

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 warranted where a defect in the indictment created a possibility of prejudice (*see People v Di Falco*, 44 NY2d at 487 [1978]). Although this statutory test "is very precise and very high" (*People v Darby*, 75 NY2d 449, 455 [1990]), it does not require actual prejudice (*see People v Sayavong*, 83 NY2d at 709, 711 [1994]).

Dismissal of indictments under CPL 210.35(5) is limited to instances where prosecutorial misconduct, fraudulent conduct or errors potentially prejudice the decision reached by the Grand Jury. To that end, the "exceptional remedy of dismissal" is available in "rare cases" of prosecutorial misconduct upon a showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant (*Huston*, 88 NY2d at 409, 410). This test is met only where the prosecutor engages in an "over-all pattern of bias and misconduct" that is "pervasive" and typically willful, whereas isolated instances of misconduct, including the erroneous handling of evidentiary matters, do not merit invalidation of the indictment (*Huston*, 88 NY2d at 408, 409-410). "[T]he statutory test, which does not turn on mere flaw, error or skewing ... is very precise and very high" (*People v Darby*, 75 N.Y.2d 449, 455 [1990]). Misconduct of counsel has not warranted the dismissal of an indictment if it is otherwise validly obtained (*People v Hoffman*, 256 AD2d 1195, *leave to appeal denied*, 93 NY2d 874 [1999]).

Defendant has failed to demonstrate any misconduct by the People to warrant dismissal of the indictment or suppression of unidentified evidence that was allegedly procured from an alleged breach of ethical rules (*People v Thompson*, 22 NY3d 687 [2014]). Given the breadth of discretion placed upon the People in Grand Jury proceedings, the defendant has failed to demonstrate any pervasive misconduct, any pattern of wrongdoing or impropriety that would render the indictment defective or mandate dismissal. The defendant has failed to demonstrate any conduct whatsoever that prejudiced the ultimate decision reached by the Grand Jury in this case. Upon consideration of the minutes of the grand jury proceeding, this court finds the evidence presented is sufficient to sustain the indictment. Even absent the testimony of Leggio, the evidence is sufficient to demonstrate reasonable cause to believe that the defendant committed each and every element of each crime charged.

Defendant has failed to demonstrate any specific statutory authority under which this court is permitted to dismiss the indictment based on an alleged violation of the New York Rules of Professional Conduct³. There has been no showing that the People relied on evidence protected by any privileged information to warrant an inquiry or a hearing. Contrary to defendant's reliance on *United State v Iorizzo*, 786 F2d 52 [2d Cir 1986] and New York Rule of Professional Conduct 8.3⁴, requiring the prosecution to advise the court of a conflict, the People contend that no conflict of interest ever existed and as such, the People contend that there was nothing for the Westchester County District Attorney's Office to report. Notwithstanding the People's protestations, and while generally both defense counsel and the prosecution have a duty

³For example, under CPL Article 710, which statute is designed to assure that a defendant has a "fair pretrial procedure to address alleged constitutional violations" (*People v Mendoza*, 82 NY2d 415, 425 [1993]), an aggrieved defendant may move to suppress evidence obtained by enumerated unlawful grounds (CPL 710.20). That statute expressly permits suppression of statements which were involuntarily made within the meaning of CPL 60.45, however fails to address the exclusion of statements obtained in violation of ethical rules.

Courts are unwilling to dismiss an indictment in response to a prosecutor's violation of an ethical rule before the grand jury, reserving that ultimate sanction for instances in which a prosecutor either has deprived the defendant of important statutory or constitutional rights (*see, e.g., Whitehouse v United States Dist. Ct.*, 53 F3d 1349, 1360 [1st Cir. 1995]) (explaining that a federal court's power to dismiss an indictment is reserved for "extremely limited circumstances," as doing so "directly encroaches upon the fundamental role of the grand jury").

⁴ Rule 8.3 of the Rules of Professional Conduct (22 NYCRR 1200.0), entitled "Reporting professional misconduct," provides as follows:

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation;
- (b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct;
- (c) This Rule does not require disclosure of:
 - (1) information otherwise protected by Rule 1.6; or
 - (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program (Rule 8.3).

to recognize potential conflict situations, what is significant is that a conflict does not impede on defense counsel's representation (*People v Sanchez*, 21 NY3d 216, 223 [2013]). Mr. Richman has not demonstrated any possible conflict nor that the possibility that it acted contrary to his representation of his client. It is noteworthy that the defendant has not moved to disqualify the People (and only moves to disqualify Mr. Quinn in a footnote) and fails to demonstrate actual prejudice to the defendant, a requisite element for disqualification of the Office of the District Attorney (see *People v Castaldo*, 48 Misc3d 996 [Putnam Co. Ct. 2015])⁵.

Defendant's reliance on *People v Jackson*, 138 AD3d 1431 [4th Dept 2016] is misplaced as it relates to a court's inquiry where a cooperation agreement was negotiated by a partner in the same firm as the defendant's counsel. It is undisputed that defendant's current counsel is not conflicted and defendant has failed to demonstrate a conflict with his specious accusations that Mr. Quinn undermined or breached any loyalty owed to him. Here, defendant's arguments are speculative as he has not proffered any findings of an ethical violation as to Mr. Quinn and proffers only conjecture against the People. Notwithstanding, the defendant's counsel admits that he was aware of Mr. Quinn's representation of Leggio at arraignment however he was retained in this case in January 2016 and has not objected to Mr. Quinn's representation at any court appearance.

Notwithstanding the court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, and as set forth above, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment.

Defendant's request to dismiss the indictment pursuant to CPL 210.20 and pursuant to 210.40 in furtherance of justice is denied. The defendant has cited no persuasive or compelling factor, consideration or circumstances under CPL 210.40 warranting dismissal of this indictment. In reaching a decision on the motion, the court has examined the factors listed in CPL 210.40, which include, in relevant part, 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 the defendant; any exceptionally serious misconduct of law enforcement personnel; the purpose and effect of imposing upon the 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 the defendant would constitute or result in injustice.

The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the

⁵ Notably, a party seeking to disqualify an attorney on the ground that there is a conflict between the current representation and that of a former client must establish not only the existence of the prior attorney-client relationship but also that "the former and current representations are both adverse and substantially related" (*Solow v W.R. Grace & Co.*, 83 NY2d 303, 308 [1994]).

defendant of the conduct which is the subject of the indictment (CPL 200.50). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]). Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, to the extent defendant seeks a copy of the grand jury minutes it is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

The grand jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). The evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]). Additionally, the minutes reveal a quorum of the grand jurors was present during the presentation of evidence, that the Assistant District Attorney properly instructed the grand jury on the law, and only permitted those grand jurors who heard all the evidence to vote the matter.

II.

MOTION to SUPPRESS STATEMENTS or
FOR a MASSIAH HEARING

This branch of the defendant's motion seeking to suppress statements on the grounds that they were unconstitutionally obtained by the People through their agent after defendant's Sixth Amendment right to counsel attached pursuant to *Massiah v United States*, 377 US 201 [1964] is denied. A *Massiah* hearing is not applicable to the instant case as a defendant must demonstrate that the government and their informant took some investigatory technique or action that was designed deliberately to elicit incriminating statements after the defendant's Sixth Amendment right to counsel attached *Massiah v United States*, 377 US 201 [1964]. As the People have not noticed any statements made by defendant they intend to use at trial after his Sixth Amendment right to counsel attached, the motion is denied as premature. In addition, the People have provided 3 affidavits containing sworn allegations of fact that investigatory techniques were not used to illicit any post-arraignment statements from the defendant.

III.

MOTION FOR PRODUCTION OF INFORMANT and DISCLOSURE OF SEARCH
WARRANT APPLICATION or for a DARDEN HEARING

Defendant moves to suppress evidence obtained from an electronic surveillance warrant signed on September 28, 2015 by the Hon. Barry Warhit, for lack of probable cause, or in the alternative, for the People to provide the defendant within an unredacted copy of Detective Mauro's affidavit and the identity of the confidential informant relied upon in the affidavit and/or for a *Darden* hearing. Defendant moves pursuant to CPL 710.20 and 710.40 to suppress all evidence derived from the interceptions or for the court to conduct a hearing upon the motion.

Defendant asserts that the probable cause for the electronic interceptions authorized in

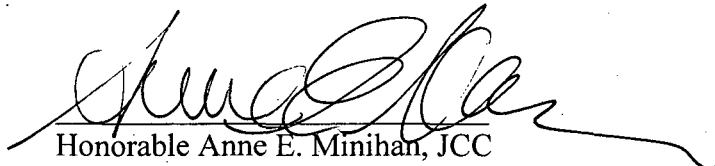
September 2015 are addressed in the affidavit of Detective William Mauro. Defendant contends that much of the information obtained from the confidential informant is redacted from the Mauro affidavit pursuant to a protective order issued by the court on December 5, 2016. Based on this redacted affidavit, the defendant argues that the probable cause is lacking to issue the electronic surveillance warrant. To that end, defendant requests that the People be required to provide an unredacted version of the Mauro affidavit and the identity the confidential informant or at the very least that the court conduct a hearing pursuant to *People v Darden*, 34 NY2d 177 [1974].

The People are directed to submit the unredacted warrant affidavit for the court's review. The court will conduct a *Darden* hearing and the defendant is to submit any questions which he desires the court to inquire in writing *within 3 business days* of this decision and order (*People v Greco*, 187 AD2d 151 [3d Dept 1993]). If no questions are received by the close of business on Friday March 17, 2017, then the court will proceed accordingly.

The determination of readiness date is adjourned to **March 28, 2017** where the court will issue its decision after the *Darden* hearing.

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

Dated: White Plains, New York
March 16, 2017



Honorable Anne E. Minihan, JCC

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