

People v Irizarry

2017 NY Slip Op 32769(U)

November 29, 2017

Criminal Court of the State of New York, Bronx County

Docket Number: 2017BX030471

Judge: Jeffrey Rosenblueth

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Short Form Order

CRIMINAL COURT OF THE STATE OF NEW YORK
BRONX COUNTY- PART AP-4

P R E S E N T:

HON. JEFFREY ROSENBLUETH

-----:
THE PEOPLE OF THE STATE OF NEW YORK

DKT. NO. 2017BX030471

-against-

MOTION: for court ordered subpoena

KHASAD IRIZARRY

Defendant.

-----:
The following papers numbered
1 to 3 submitted in this motion

Zamir Ben-Dan, Esq.
Legal Aid Society
FOR THE MOTION

Emily B. Gold, Esq.
New York City Police Department
OPPOSED

Papers
Numbered

Notice of Motion and Affidavits Annexed 1
Memorandum of Law _____
Affirmation in Opposition 2
Sur-reply 3
Transcript _____

Defendant's motion for the issuance of a court ordered subpoena directing the New York City Police Department to produce for an *in camera* inspection by the court records pertaining to P.O. Ivan Calero is granted in accordance with the accompanying memorandum attached hereto.

Dated: November 29, 2017


Judge of the Criminal Court

HON. JEFFREY ROSENBLUETH

M E M O R A N D U M

**CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART AP-4**

-----:
THE PEOPLE OF THE STATE OF NEW YORK

BY JEFFREY ROSENBLUETH, J.

-against-

DATED: November 29, 2017

KHASAD IRIZARRY

DKT# 2017BX030471

Defendant.

-----:
Defendant is charged in the information with committing the crime of Criminal Possession of a Marijuana in the Fifth Degree, [PL 221.10(1)] and the violation of Unlawful Possession of Marijuana, [PL 221.05]. The information alleges, in pertinent part, that on June 11, 2017 at approximately 8:05 p.m. opposite 894 Rogers Place in the county of the Bronx, P.O. Ivan Calero observed defendant throw a lit and burning cigarette to the public sidewalk and thereafter one clear bag of marijuana was recovered from defendant.

Defendant now moves pursuant to New York Civil Rights Law section 50-a (CRL section 50-a) for the issuance of a court ordered subpoena duces tecum directing the New York City Police Department (NYPD) to produce for an *in camera* inspection by the court "[a]ny and all records pertaining to Police Officer Ivan Calero, shield #009301" including but not limited to:

"1. ...personnel files, Internal Affairs files and Civilian Complaint Review Board proceedings of the New York City Police Department, indicating prior or current internal and civilian complaints, investigations, or reports in which allegations were made of:

i. dishonesty, falsehoods (in whatever form), or false/illegal arrests and/or

- searches, fabrication of charges and/or evidence;
- ii. improper tactics, threats of any nature, and use of excessive lethal or non-lethal force;
- iii. corruption, theft, conduct unbecoming an officer, and neglect of duty; and
- iv. any other misconduct deemed relevant by the Court.”

Defendant claims that inasmuch as P.O. Calero has been the subject of two separate federal civil rights lawsuits an *in camera* inspection of the officer's personnel records will likely reveal similar allegations of misconduct which would be material and relevant to the officer's credibility and facts at issue in the instant case.

Defendant, in support of his application, has attached to his motion, (Exhibit A), a copy of a federal complaint filed in the United States Southern District Court which alleges, in pertinent part, that on July 16, 2014 while the fifteen year old plaintiff was walking down a Bronx street P.O. Calero, without warning, grabbed him, slammed him against a building, handcuffed him and threw him to the ground. The plaintiff further claims that he was then assaulted by a group of officers causing cuts and bruises to his face and upper body. Plaintiff states he was held for approximately four hours in the precinct before being released without any criminal charges filed against him.

Additionally, defendant has attached to his motion, (Exhibit B), a copy of another unrelated federal complaint filed in the United States Southern District Court which alleges, in pertinent part, that on June 7, 2014 outside of 894 Rogers Place in the county of the Bronx, police officers, including P.O. Calero, issued orders for the plaintiffs to leave the area and go inside of the residential building at the aforementioned location “for no reason”. The complaint further alleges that after one of the plaintiffs questioned the police officers about their directive he was placed under arrest and while the other plaintiff

attempted to record the incident on his cell phone camera he was tackled to the ground and arrested. It is alleged that both plaintiffs were charged with Disorderly Conduct and such charges were ultimately dismissed.

Based upon the foregoing, defendant asserts that similar to the civil lawsuits which allege Officer Calero arrested citizens on false pretenses, here "P.O. Calero and his partner stopped him without any legal justification, falsely charged him with possession of a burnt marijuana cigarette and used that as a pretext for a search in which more marijuana was allegedly found".

The New York City Police Department contends that defendant's motion is procedurally barred because P.O. Calero was not properly served with it and in any event, it is without merit. Specifically, the NYPD contends that defendant has failed to present a clear showing of a good faith factual predicate to warrant the issuance of a subpoena for the officer's records.

The People did not file a response to defendant's motion.

In determining defendant's motion the Court has reviewed all the submissions including the attached exhibits and the relevant law.

Defendant's motion is decided as follows:

CRL section 50-a provides, in pertinent part,

" Personnel records of police officers, firefighters and correction officers

1. All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state of any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law...shall be considered confidential and not subject to inspection or review without the express written of such police officer...except as

may be mandated by lawful court order.

2. Prior to issuing such order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.

3. If, after such hearing, the judge concludes that there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting...".

Here, as an initial matter, the Court concludes that defendant's motion is not procedurally barred. Although, it is clear that P.O. Calero is an interested party under CRL section 50-a, "the statute does not require an interested officer be personally served with notice, but requires only that the officer be given an opportunity to be heard" (see *Frisillo v. State of New York*, 185 AD2d 616). Defendant's affidavit of service, (Exhibit "F" to defense counsel's reply affirmation), indicates that on August 30, 2017 at 12:45 p.m. Marisol Doran, an investigator with the Legal Aid Society, served defendant's motion on P.O. Sanchez at the 41st precinct .¹ Thus, the Court finds that the affidavit of service constitutes prima facie evidence of proper service upon a "person of suitable age and discretion" at P.O. Calero's "actual place of business", (see CPLR section 308; *Rivera v. Banks*, 135 AD3d 621).

Turning now to the merits of defendant's motion, in order to justify a disclosure of a police officer's personnel files, CRL section 50-a(2) requires that the movant party make "a clear showing of facts sufficient to warrant the judge to request records for

¹ The NYPD, in its reply to defendant's motion, does not dispute that P.O. Calero was assigned to the 41st precinct on the date of service.

review”. This requirement is designed to eliminate fishing expeditions into police personnel records for the purpose of obtaining collateral information in order to impeach the officer’s “general credibility” (see *Zarn v. City of New York*, 198 AD2d 220).

The Court of Appeals in *People v. Gissendanner*, 45 NY2d 543, while recognizing “tension between the constitutionality based right of an accused to cross-examine adverse witnesses...and the interest of the State and its agents in maintaining confidential data relating to performance of police...” set forth a framework for analyzing a defendant’s application to subpoena police records under CRL section 50-a. In striking a balance between the two competing interests, the Court held that a defendant in making such an application, must set forth in good faith “some factual predicate which would make it reasonably likely that the file” will contain “information that carries a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends”, (*Id* at 550). This standard must be viewed liberally as a party seeking discovery may “not know precisely what pertinent information is within a personnel record; thus, a strict reading would render the statute meaningless”, (*Cox v. New York City Housing Authority*, 105 AD2d 663; see *People v. Morales*, 97 Misc2d 733).

In the case at bar, when viewing the threshold requirement of CRL section 50-a(2) liberally, the Court finds that based upon the allegations contained in defendant’s motion and exhibits he has in good faith set forth a sufficient factual predicate to satisfy the *Gissendanner* standard. Defendant has established a tenable nexus between the alleged misconduct of P.O. Calero in the civil suits and the instant matter inasmuch as it is alleged in both that he made those arrests without having any legal basis to do so. Thus, defendant has demonstrated “ ‘a likelihood that the [police] witness’ ...prior acts of

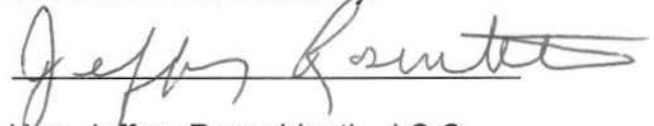
misconduct believed to be within such records 'bear peculiar relevance to the circumstances of defendant's case' ", *People v. Smith*, 27 NY3d 652 citing *People v. Gissendanner*, 48 NY2d at 549).

Moreover, the issuance of a subpoena for an *in camera* inspection of the records is warranted since it is likely that the viability of the criminal charges against defendant will hinge on the credibility of P.O. Calero (see *People v. Smith*, *Id*; *People v. Gissendanner*, *supra*).

Accordingly, defendant's motion is granted. Defendant shall submit a subpoena to the Court for signature within ten (10) days of the date of this decision and such subpoena shall order that the officer's records be sealed and sent directly to the attention of Judge Jeffrey Rosenblueth, Part AP-4, Bronx Criminal Court. The *in camera* inspection of the records will be conducted by the trial judge pursuant to CRL section 50-a (3).

Order entered accordingly.

This constitutes the decision and order of the Court. The Clerk of the Court is directed to forward a copy of this order and memorandum to the attorney for the defendant, the New York City Police Department and the District Attorney.



Hon. Jeffrey Rosenblueth, J.C.C.

Dated: November 29, 2017

HON. JEFFREY ROSENBLUETH

c.c. For the Defendant: Zamir Ben-Dan, Esq.
The Legal Aid Society

For the NYPD: Emily Gold, Esq.