People v Covlin
2017 NY Slip Op 33414(U)
April 19, 2017
Supreme Court, New York County
Docket Number: Index No. 04339/15
Judge: Daniel Conviser
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY CRIMINAL TERM: PART-95

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THE PEOPLE OF THE STATE OF NEW YORK .

. Ind. No.: 04339/15

-against- .

. DECISION & ORDER

RODERICK COVLIN, .

Defendant. .

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DANIEL P. CONVISER, J.:

This decision addresses a number of the Defendant's pre-trial motions. It does not address the Defendant's motions regarding the execution of search warrants, which will be addressed in a later decision.

Motions Regarding Grand Jury Evidence

The Defendant has moved for disclosure of the grand jury minutes or in the alternative for the Court to review the minutes and dismiss the indictment. The motion to disclose the grand jury minutes is denied.

The Court has read the grand jury minutes, finds them legally sufficient and finds that the grand jury presentment was not impaired by any illegality. The Court has also granted the Defendant's request to "carefully review the Grand Jury minutes to determine whether there is sufficient **admissible** evidence presented to establish the crimes charged and whether the Grand Jury was infected with irrelevant, inadmissible and prejudicial evidence of prior "bad acts".[1]

[1] Defense counsel's affirmation in support of Defendant's Omnibus Motion, August 29, 2016 (the "Gottlieb Affidavit"), ¶ 19. (emphasis in original).

A grand jury indictment is authorized when the evidence before the grand jury is "legally sufficient" to establish that a person committed a charged offense and when competent and admissible evidence provides reasonable cause to believe the person committed that crime. CPL 190.65 (1). The first prong of the statute requires that the People present *prima facie* evidence of an offense. The second prong describes the degree of certainty which grand jurors must have to sustain an indictment. On a motion to dismiss or reduce an indictment pursuant to CPL 210.20 (1) (b) the Court's review is limited to the first prong of the statute. *People v. Swamp,* 84 NY2d 725 (1995).

The question in such motions is whether "the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury". *People v. Bello,* 92 NY2d 523, 525 (1998). "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 each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt." *People v. Ackies,* 79 AD3d 1050, 1056 (2d Dept 2010). "[L]egal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt." *Bello, supra,* 92 NY2d at 526.

The People did present evidence of prior bad acts to the grand jury, with proper limiting instructions. In the Court's view, there was nothing improper about this evidence. The grand jury was not presented with any evidence regarding any allegation that: (i) the Defendant planned to arrange a fake marriage for his daughter; (ii) "poked" a series of underage girls on Facebook in 2012[2], or (iii) engaged in conduct which the Defendant describes as a "sealed event" which was

[2] *Id.*, ¶ ¶ 24-26

discussed at the Defendant's arraignment.[3]

Motion to Suppress Statements

The Defendant moves to suppress all statements alleged to have been made by him, or in the alternative, for a hearing pursuant to *People v. Huntley*, 15 NY2d 72 (1965) to determine whether such statements are admissible at trial. The parties' moving papers specifically reference 22 statements listed in the People's Voluntary Disclosure Form (VDF) which are alleged to have been made by the Defendant either to law enforcement or employees of child services agencies.[4] Additionally, the Defendant moves for a hearing pursuant to *Massiah v. United States*, 337 US 201 (1964) to determine whether recordings by a civilian of statements allegedly made by the Defendant were procured in violation of his constitutional right to counsel because the civilian was acting as an agent of law enforcement. The People oppose the motion arguing that the statements attributable to the Defendant were voluntarily made and not the product of any illegality.

As outlined below, the Defendant's motion is granted to the extent that the Court will conduct a *Huntley* hearing concerning statements 2, 3, 5-13 and 16-18 to determine whether the People have established that those statements were voluntarily made beyond a reasonable doubt. In all other respects, including the motion seeking a *Massiah* hearing, the Defendant's motion is denied.

The People have indicated that they do not intend to introduce statements #15 and 20-22

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[3] *Id.*, ¶ 24. This Court did not preside over this case at the time this "sealed event" was discussed but has confirmed that the information discussed during this sealed event was not presented to the grand jury.

[4] This decision and order will reference the statements by number as outlined in the VDF.

during their direct case at trial.[5] An assertion by the People that they will not be introducing a defendant's statement at trial constitutes a stipulation within the meaning of CPL 710.60 (2) (b) obviating any need for a suppression hearing. *People v. White*, 73 NY2d 468 (1989); *cert denied*, *White v. New York*, 493 US 859. Since the People have stated they will not seek to introduce statements #15 and 20-22 they are suppressed with respect to the People's direct case pursuant to stipulation and no hearing is required.

Although CPL 710.30 (1) (a) requires the People to provide notice of statements alleged to have been made to a "public servant", case law has interpreted the role of child services employees disparately in that regard. In *People v. Whitmore*, 12 AD3d 845 (3d Dept 2004), *lv denied*, 4 NY3d 769 (2005) and subsequently in *People v. Wilhelm*, 34 AD3d 40 (3d Dept 2006) the Appellate Division, Third Department held that child protective services workers fall within the broad definition of the term "public servant" as set forth in CPL 710.30. However, in *People v. Batista*, 277 AD2d 141 (1st Dept 2000), *lv denied*, 96 NY2d 825 (2001), the Appellate Division, First Department determined that statements to child protective services workers are not made to "public servants" under CPL 710.30. In that case, the Court reasoned the statute was intended by the legislature to only provide notice of statements made to law enforcement personnel.

Concerning the instant motion, statements #1, 4, 14, and 19 in the VDF are alleged to have been made either to a Child Protective Specialist with Children's Services or a case worker

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[5] *See* People's VDF at p.2; People's Affirmation in Response to Defendant's Omnibus Motion (the "Bogdanos Affidavit"), ¶ 9.

employed by Westchester County Children's Services[6]. Given that it is the First Department which has jurisdiction over appeals in this case, this Court believes it is appropriate to follow the First Department's holding with respect to the applicability of CPL 710.30 to statements allegedly made to child protective services workers. The motion for a hearing to determine whether these statements were voluntarily made is therefore denied.

Where a defendant claims a statement to law enforcement was involuntarily made, as the Defendant has done here with respect to his alleged statements to the police, the Court should generally grant a defendant's motion for a *Huntley* hearing. *People v. Weaver*, 49 NY2d 1012 (1980). With respect to statements #2, 3, 5-13 and 16-18, the Court grants the Defendant's motion to the extent that a *Huntley* hearing will be held to determine their admissibility at trial. All of these statements by the Defendant are alleged to have been made to individuals referred to by the People as police officers or detectives.

Statements obtained in violation of a defendant's right to counsel by a civilian acting as an agent of law enforcement are not admissible at trial. *Massiah v. United States*, 84 SCt 1199 (1964). Pursuant to CPL 710.60 (4) a hearing on a suppression motion must be conducted unless, pursuant to CPL 710.60 (3) (b), the sworn factual allegations do not support the ground on which suppression is being sought. *People v. Weaver*, *supra*.

Here, the Defendant seeks a *Massiah* hearing on the ground that recorded statements alleged to have been made by the Defendant to a former girlfriend, Debra Oles, between 2013 and 2015 were the product of Ms. Oles's agency relationship with law enforcement. The

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[6] Statement #15 is also alleged to have been made to a child services worker, but as indicated above, the People will not be seeking to admit this statement at trial.

Defendant has referenced several alleged recorded communications between him and Ms. Oles, however only two - one from December 13, 2013 and another made on September 23, 2015 - are specifically highlighted. There is no dispute that the Defendant was represented by his current attorney continuously since January of 2012.

A hearing is not required to determine whether a civilian is an agent of the police if a defendant fails to allege facts raising an issue as to state action. *See People v. Manrique*, 57 AD3d 265 (1st Dept 2008), *lv denied*, 12 NY3d 760 (2009) (holding that a defendant who has ample information concerning a civilian is required to do more than baldly assert an agency relationship with law enforcement to obtain a hearing). If a civilian's actions are not instigated or supervised by the police and not conducted at their request a finding of agency for suppression purposes is not warranted. *People v. Duerr*, 251 AD2d 161 (1st Dept 1998), *lv denied*, 92 NY2d 949. Even if law enforcement encourages a civilian to record communications with a defendant by loaning out equipment to her that does not necessarily create an agency relationship. *People v. Hemriquez*, 214 AD2d 485 (1st Dept 1995).

The communications between Ms. Oles and law enforcement which have been provided to the court which occurred until August 19, 2014 indicate that Ms. Oles was not acting as an agent of law enforcement and indeed had taken actions to oppose law enforcement's investigation.[7] Here, with respect to the December 13, 2013 recording the Defendant has failed to demonstrate a colorable claim of agency between Ms. Oles and the police. The exhibits the Court has received include e-mail exchanges between Ms. Oles and NYPD Detective Robert

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[7] *See* People's Affirmation in Opposition to Defendant's Omnibus Motion, December 5, 2016 (the "Bogdanos Affidavit"), ¶ 18 and supporting exhibits.

Mooney and text messages between Ms. Oles and her daughter. A reading of the e-mails and text messages provides no basis to believe that Ms. Oles was acting as an agent of the police. Her e-mail to Detective Mooney on July 16, 2013 indicated that she had provided all the information she knew to investigators in 2010 and had nothing new to add.[8] An e-mail between Ms. Oles and Detective Mooney on August 19, 2014 makes it clear that Detective Mooney was under the impression that he could not freely speak to Ms. Oles because he understood she was represented by counsel.[9] None of the additional communications submitted by the parties provide any basis to believe Ms. Oles was acting as an agent of law enforcement.

Since the People do not intend to use the recording made on September 23, 2015 there is no issue to litigate warranting a hearing with respect to that alleged conversation. That recording is suppressed. *People v. White, supra.* The Defendant points out that the People have apparently conceded that Ms. Oles was acting as an agent of law enforcement with respect to that communication since the People have argued that "because there is no question that the only time Ms. Oles spoke to the defendant after she was an agent of law enforcement is a statement the People do not intend to introduce, the motion [for a *Massiah* hearing] ought to be denied in its entirety".[10] Were the only information this Court had regarding the December 13, 2013 recorded conversation was that Ms. Oles was working as an agent of law enforcement two years later, that fact would, in this Court's view, warrant a hearing with respect to the December 13, 2013 call. But that is not the only information before the Court. Here the Court has extensive evidence that

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[8] *Id.*, Exhibit J

[9] *Id.*, Exhibit M

[10] *Id.*, ¶ 18 (i)

Ms. Oles was *not* working as an agent of law enforcement at least until August 19, 2014. The People, moreover, have asserted that they are "aware of only one recording of the defendant involving Ms. Oles after August 19, 2014" [the one the People do not intend to introduce at trial].[11] The motion for a *Massiah* hearing is denied.

Additional Motions

The Defendant's motion for a Bill of Particulars is denied. A *Sandoval* hearing will be conducted prior to the trial. The Defendant's motion for the immediate disclosure of prior bad act evidence is denied. The Court will, at a minimum, schedule an argument regarding any prior bad act evidence the People intend to introduce well enough in advance of a scheduled trial to allow the Defendant to adequately prepare for trial. The Court will initially consider argument as to whether an evidentiary hearing is required regarding such prior bad act evidence. With respect to such prior bad act evidence, the Court does not believe it is appropriate to defer any argument and decision on that issue to a time "immediately prior to the commencement of trial"[12], as the People have asked, since that might make it difficult for the Defendant to adequately prepare for trial. The People and the Defendant are reminded of their continuing discovery obligations. As the People point out, the Defendant has not timely served notice of any intention to present psychiatric evidence during the trial pursuant to CPL 250.10 (2).

April 19, 2017

Daniel Conviser, A.J.S.C.

Hon. D. Conviser

[11] *Id.*, ¶ 18 (h)

[12] *Id.*, ¶ 26