People v Brooks
2009 NY Slip Op 33456(U)
December 1, 2009
Supreme Court, New York County
Docket Number: 2781-09
Judge: Charles H. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 82

102528/09

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOSEPH BROOKS, DEFENDANT

DECISION AND ORDER
INDICTMENT 2781-09

CHARLES H. SOLOMON, J.:

Defendant was indicted on June 19, 2009 and charged with eights counts of Rape in the First Degree [Penal Law §§130.35(1) and (2)], four counts of Rape in the Second Degree [Penal Law §130.30(2)], four counts of Rape in the Third Degree [Penal Law §130.25(3)], eight counts of Criminal Sexual Act in the First Degree [Penal Law §§130.50(1) and (2)], two counts of Attempted Criminal Sexual Act in the First Degree [Penal Law §§110/130.50(1)], seven counts of Criminal Sexual Act in the Second Degree [Penal Law §130.45(2)], Attempted Criminal Sexual Act in the Second Degree [Penal Law §§110/130.45(2)], six counts of Criminal Sexual Act in the Third Degree [Penal Law §130.40(3)], nineteen counts of Sexual Abuse in the First Degree [Penal Law §130.65(1)], Attempted Sexual Abuse in the First Degree [Penal Law §§110/130.65(1)], ten counts of Sexual Abuse in the Second Degree [Penal Law §130.60(1)], Attempted Sexual Abuse in the Second Degree [Penal Law §§110/130.60(2)], Sexual Abuse in the Third Degree (Penal Law §130.55), seven counts of Forcible Touching (Penal Law §130.52), Assault in the Second Degree [Penal Law §120.05(6)], Grand Larceny in the Fourth Degree [Penal Law §155.30(4)] and Criminal Mischief in the Fourth Degree [Penal Law §145.00(1). The charges stem from allegations that defendant, an Academy Award winning composer and Broadway producer, lured eleven young women who lived out of state to his apartment via Internet ads with the promise that they would be auditioning for a movie role. Once there, defendant sexually assaulted them, in several of the incidents after administering a

pharmaceutical in a glass of wine.

By way of an omnibus motion filed August 11, 2009, defendant moves for various forms of relief. The People filed a response to defendant's motion on September 29, 2009. Additionally, the People submitted the grand jury minutes for the Court's review. Defendant filed a reply to the People's response on October 13, 2009. After a review of the arguments raised by counsel, and after a review of the evidence before the grand jury, defendant's motion is decided as follows.

Grand Jury Presentation:

In order to return a valid indictment, the grand jury must be presented with evidence that is legally sufficient to establish that the defendant committed the crimes charged. In addition, the competent and admissible evidence presented must provide reasonable cause to believe the defendant committed the crimes. CPL 190.65(1); People v. Gordon, 88 NY2d 92, 95 (1996); People v. Swamp 84 NY2d 725, 729 (1995). The first requirement is that the People present a *prima facie* case against the defendant. The second requirement is that the evidence established reasonable cause to believe defendant committed the crimes. People v. Gordon, *supra*, 95-96; People v. Swamp, *supra*, at 730; People v. Deegan, 69 NY2d 976, 978-979 (1987). The People are not required to present proof which convinces the grand jury beyond a reasonable doubt of defendant's commission of the crimes charged. In reviewing the evidence before the grand jury pursuant to a motion to dismiss an indictment under CPL 210.20(1)(b), the court's inquiry is limited to whether the People have presented a legally sufficient case. People v. Bello, 92 NY2d 523, 526 (1998). Legally sufficient evidence has been defined as "competent evidence which, if

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accepted as true, would establish every element of an offense charged and the defendant's commission thereof." CPL 70.10(1). Stated another way, the reviewing court must decide whether the evidence before the grand jury, viewed in a light most favorable to the People, if unexplained and uncontradicted, would support a finding of guilt by a petit jury. People v. Bello, *supra*, at 525. Examined in that light, the evidence presented to the grand jury was sufficient as to all counts.

The Court has reviewed the grand jury presentation in light of the standards set forth above, as well as in light of the specific challenges made by defendant. It is the Court's opinion that the People have made out a *prima facie* case establishing defendant's guilt of the various crimes charged in each count of the indictment.

Defendant asks the court to review the legal instructions given to the grand jury. While a grand jury need not be instructed with the same precision as a petit jury, the People are required to provide the grand jury with the essential elements of the crimes they are considering. People v. Darby, 75 NY2d 449, 454-455 (1990); People v. Calbud, Inc., 49 NY2d 389, 394-395 (1980). The Court has reviewed the legal instructions given by the assistant district attorney and finds that they adequately apprised the grand jurors of the applicable law. The Court also finds that there were no procedural defects affecting the validity of the indictment or impairing the integrity of the grand jury proceedings. CPL 210.35(5); People v. Darby, *supra*, at 454. Defendant's motion to dismiss on those grounds is also denied.

Defendant has moved for release of the grand jury minutes. The People oppose release of the minutes, citing CPL 210.30(3). In connection with a motion to dismiss an indictment, CPL 210.30(3) provides that the court may release grand jury minutes "if the court, after

examining the minutes, finds that release of the minutes, or certain portions thereof, to the parties is necessary to assist the court in making its determination on the motion." *See*, Attorney General v. Firetog, 94 NY2d 477, 484 (2000). The court has inspected the minutes and feels that the assistance of counsel is not necessary in order to reach a decision as to the legal sufficiency of the evidence presented.

Motion to Dismiss Counts as Multiplicitous:

Defendant moves to dismiss numerous counts of the indictment on the ground of multiplicity. An indictment is multiplicitous when "'two separate counts . . . charge the same crime.'" *See* People v Nailor, 268 AD2d 695, 696 (3rd Dept 2000), *quoting* People v Kindlon, 217 AD2d 793 (3rd Dept), *lv denied* 86 NY2d 844 (1995). If, however, each count requires proof of an additional fact that the other does not, then multiplicity does not exist. People v. Kindlon, *supra*. Where a defendant's acts are characterized as a continuing offense, the defendant cannot properly be charged with more than one offense for that conduct. People v. Quinones, 8 AD3d 589 (2nd Dept 2004), *lv denied* 3 NY3d 710. However, where defendant's acts are separate and distinct, then multiple counts charging the same crime are proper. People v. Black, 38 AD3d 1283 (4th Dept 2007), *lv denied* 8 NY3d 982; People v. Grasso, 281 AD2d 986 (4th Dept 2001), *lv denied* 96 NY2d 800.

Defendant argues that with respect to the eleven separate complainants, each incident represents a single, continuous course of conduct and that the various counts relating to each incident must be dismissed as multiplicitous. The People oppose defendant's application,

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contending that the majority of these counts involve either a separate complainant or a separate crime, requiring proof of an additional fact, thus negating any claim of multiplicity. Where the same exact crime is charged more than once and involves the same complainant, the People argue that each count relates to a separate and distinct act and that the charge is, therefore, not multiplicitous.

The Court has reviewed the counts charged in the indictment in light of these arguments and finds that none of the counts are multiplicitous. As the People correctly point out, the majority of the counts involve different complainants. With respect to those counts involving the same complainant, different criminal offenses are charged which require proof of additional facts. In the few instances where multiple counts charge a violation of the same statute with respect to the same complainant, the evidence before the grand jury established that the defendant's acts were separate and distinct, and not part of a continuous course of conduct. *See*, People v. Black, *supra*; People v. Brandel, 306 AD2d 860 (4th Dept 2003); People v. Grasso, *supra*; People v. Smithers, 255 AD2d 916 (4th Dept 1998), *lv denied* 92 NY2d 1054; People v. Yankowitz, 169 AD2d 748 (2d Dept 1991), *lv denied* 77 NY2d 883; *cf* People v. Moffitt, 20 AD3d 687 (2d Dept 2005), *lv denied* 5 NY3d 854; People v. Watkins, 300 AD2d 1070 (4th Dept 2002), *lv denied* 99 NY2d 659; People v. Grant, 108 AD2d 823 (2d Dept 1985). As such, these counts are not multiplicitous and defendant's motion to dismiss on that ground is denied.

Repugnant Counts:

Defendant argues that various counts of the indictment relating to the same criminal conduct with respect to the same complainant are logically inconsistent and repugnant since they

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are based upon different theories of prosecution. Specifically, defendant challenges the various counts that charge the same conduct alleged to have been committed by forcible compulsion, by reason of the complainant's mental incapacitation, and without the complainant's consent. The People argue that there is no legal prohibition against submitting to the grand jury the same crime committed in different ways and that the possible repugnancy of a future verdict is not a concern at this stage of the proceedings. Moreover, the People argue that the facts presented to the grand jury support charges under different legal theories and that those different theories are not repugnant or inconsistent with each other.

Defendant's motion to dismiss on this ground is denied. The People acted within their authority when they submitted alternate theories to the grand jury and the evidence that they did present supports the grand jury's decision to indict defendant for committing these crimes under these different theories. *See*, People v. Lopez, 14 Misc3d 1216 (Sup Ct, Kings Co 2007); People v. Mazyck, 6 Misc3d 209 (Sup Ct, Kings Co 2004); People v. Lin, 169 Misc2d 689 (Sup Ct, Kings Co 1996). Further, the theories charged are not necessarily repugnant or mutually exclusive. Defendant's arguments are more properly raised at trial by way of a motion for a trial order of dismissal [CPL 290.10(1)] at the conclusion of the People's case.

Motion to Sever:

Defendant has moved the sever certain counts of the indictment from other counts. Specifically, he seeks to have all of the counts pèrtaining to each of the eleven complainants tried separately from the counts relating to each of the other complainants. Essentially, defendant is seeking eleven separate trials. Defendant argues that the counts related to each

complainant are not properly joined under CPL 200.20(2)(b), since there is no evidence of a *modus operandi* in this case. Further, defendant also claims that as there is ample alternative evidence establishing defendant's identity available to the People, any evidence of a *modus operandi* is of little probative value. Defendant further contends that he will be unduly prejudiced at a trial if a severance is not granted because of the shear volume of the allegations against him.

The People oppose defendant's motion. They argue that all of the counts are properly joined under CPL 200.20(2)(b). That is so, the People argue, because evidence relating to each of the complainants would be admissible at a trial with respect to all the complainants on the issue of motive, intent, absence of mistake or accident, and a common scheme or plan, as well as to establish a unique *modus operandi* which is relevant and probative on the issue of identity. Additionally, the People argue that the counts are properly joined under CPL 200.20(2)(c), as the charges are defined by the same or similar statutory provisions.

The multiple counts relating to the nine criminal incidents which occurred during the period between March 4, 2008 and April 9, 2008 were properly joined pursuant to CPL 200.20(2)(b) and (c). The evidence presented to the grand jury supports this conclusion. Each of these nine complainants were lured to New York City by defendant thorough an Internet ad. In at least eight of the instances the ad appeared on Craig's List, and sought a young woman to play a role in a movie or music video. When the complainants replied via Internet, they were immediately contacted by co-defendant Shawni Lucier, who then spoke to and met with each complainant. Once screened by Lucier, travel arrangements were made for the complainants to immediately fly to New York for an audition with the defendant. Six of the complainants were

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from Washington state, two were from Oregon and one was from Florida. All were in their late teens or early twenties, except for one who was thirty but represented herself as a twenty year old. Most of the complainants had never been to New York City, were traveling alone, and brought little or no money with them. A few of the complainants asked to bring along a parent, but were told they were not ready for the role if they needed a parent with them. Upon their arrival in New York, the complainants were met at the airport by a driver and then taken either directly to defendant's apartment on East 63rd Street or to a hotel where they were to await contact from either Lucier or defendant. After being contacted, those complainants were again picked up by a driver and taken to defendant's apartment. Defendant was alone in the apartment when the complainants arrived. Defendant would boast to the complainants of his many accomplishments in the show business industry and made a point of showing them his Academy Award. He enticed them with promises of stardom if they were chosen for the role. Defendant then had eight of the complainants engage in what he referred to as an "acting exercise" in which they were required to drink wine in a seductive manner, tracing the path of the wine with their fingers down from their throat to their stomach. After drinking the wine, which was often only a minimal amount, the complainants almost immediately experienced serious drug-like effects. With the complainants in a compromised mental state, defendant then sexually assaulted them. Although one of the complainants did not go through with the acting exercise and was not drugged, the allegations are otherwise sufficiently similar to the other eight complainants.

Under CPL 200.20(3), the court may, in its discretion, in the interest of justice and upon a showing of good cause by the defendant, grant a severance when the separate incidents are joined solely under CPL 200.20(2)(c). This discretionary severance is available only when the

offenses are joined solely pursuant to CPL 200.20(2)(c), i.e. the offenses are defined by the same or similar statutory provisions. People v. Lane, 56 NY2d 1, 7 (1982); People v. Chancy, 271 AD2d 355 (1st Dept 2000), *lv denied* 95 NY2d 851. Where, as here, the counts were properly joined under CPL 200.20(2)(b), because evidence in each case would be admissible at a trial on the other, the court lacks the discretion to sever. In addition, as set forth above, the allegations are of extremely similar conduct making the initial joinder proper under CPL 200.20(2)(b). Clearly, evidence with respect to each of these nine complainants would be admissible at a trial with respect to the other complainants to establish defendant's intent, motive, absence of mistake or accident, common scheme or plan, and *modus operandi,* as that relates to the issue of defendant's identity. Concerning the charges involving these nine complainants committed in March and April of 2008, the evidence presented to the grand jury supports the conclusion that they were committed in an almost identical manner with a sufficiently unique *modus operandi.* People v. Beam, 57 NY2d 241, 250-253 (1982); People v. Allweiss, 48 NY2d 40 (1979); People v. Screahben, 35 AD3d 246 (1st Dept 2006), *lv denied* 8 NY3d 884. Accordingly, defendant's motion to sever the counts relating to those nine complainants is denied.

The same is not the case, however, with respect to the counts relating to the March 30, 2005 and April 23, 2007 incidents. These counts charge conduct committed earlier in time and the allegations are not as similar factually to the crimes charged with being committed in March and April of 2008. In the Court's opinion, the counts related to those incidents were not properly joined at the outset under CPL 200.20(2)(b). As the only basis supporting joinder with respect to these two incidents is CPL 200.20(2)(c), the court may grant a discretionary severance in the interest of justice and upon a showing of good cause by the defendant. CPL 200.20(3). Good

cause for a discretionary severance with respect to the counts charging the crimes committed in 2005 and 2007 exists in this case. Defendant argues that the jury will be unduly influenced and prejudiced against him by permitting them to hear evidence concerning all eleven incidents. Having weighed the public's interest in avoiding lengthy, duplicative and costly trials against defendant's claim of undue prejudice, under the particular facts and circumstances of this case, the Court is of the opinion that defendant's motion to sever with respect only to the counts related to the two incidents from 2005 and 2007, should be granted.

Bill of Particulars/Discovery:

Defendant's motion for further particularization of the charges is denied in part and granted in part. A bill of particulars is not a discovery device. CPL 200.95. Rather, it serves only to clarify the charges. As part of a bill of particulars, defendant is not entitled to the evidence the People intend to offer at trial to support their theory of the case. People v. Zurita, 64 AD3d 800 (2d Dept 2009); People v. Earel, 220 AD2d 899 (3d Dept 1995), *affd*, 89 NY2d 960 (1997). The indictment, coupled with the Voluntary Disclosure Form, adequately apprise defendant of the charges against him and the conduct underlying such charges, thus enabling him to put forth a defense with respect to all of the charges except for those relating to the incidents which are alleged to have occurred on March 30, 2005, March 7, 2008 and April 7, 2008. *See*, People v. Iannone, 45 NY2d 589, 597-598 (1978). Accordingly, defendant is not entitled to further particularization with regard to any of the charges ,other than those relating to the crimes allegedly committed on these three dates. As to those three incidents and the charges relating to them, the People are required to supply defendant with further particularization under CPL

200.95.

Defendant makes particular discovery requests set forth both in his demand for discovery as well as in his omnibus motion. Specifically, defendant seeks (1) any photographs of defendant used for identification; (2) any recorded statements of defendant and/or co-defendant which the People intend to use at trial; (3) search warrant affidavit; (4)any medical, toxicology and DNA reports or other physical, mental or scientific reports relating to the case and (5) an opportunity to inspect items seized from defendant's apartment pursuant to the search warrant. Defendant is entitled to all of these items under CPL 240.20. *See*, People v. Jenkins, 98 NY2d 280, 283 (2002). The People have indicated in their response that they will provide defendant with these items, with the exception of the search warrant affidavit. The People are directed to provide the defense with these items, including the search warrant affidavit, or alternatively, to seek a protective order stating why disclosure should be withheld.

Defendant also seeks the names, addresses and birth dates of the complainants so that he can better investigate the case and prepare for trial. Defendant is not entitled, as a matter of right, to this information pretrial. People v. Wright, 270 AD2d 213 (1st Dept 2000), *lv denied* 95 NY2d 859; People v. Rhodes, 154 AD2d 279 (1st Dept 1989), *lv denied* 75 NY2d 816. CPL Article 240 limits what material is subject to disclosure and dictates when such material must be disclosed. *See*, People v. Colavito, 87 NY2d 423, 427 (1996); People v. DaGata, 86 NY2d 40, 44 (1995); Pittari v. Pirro, 258 AD2d 202 (2d Dept 1999), *lv denied* 94 NY2d 755. The Court has considered the defendant's arguments in support of his request for the information concerning the complainants and in an exercise of its discretion, defendant's motion is denied. *See*, People v. Andre W, 44 NY2d 179, 185-86 (1978).

The discovery provided by the People is otherwise deemed adequate. Additionally, the Court notes that the People indicate that they are aware of their continuing obligations under Brady v. Maryland, 473 US 83 (1963), to turn over anything of an exculpatory nature to the defense. *See*, People v. Fuentes, 12 NY3d 259, 263 (2009).

Search Warrant:

Defendant moves to suppress evidence recovered pursuant to the execution of the search warrant on the grounds that the warrant was overbroad and that it was improperly executed. Defendant also seek discovery of the affidavit submitted in support of the warrant so that he may make additional arguments. The People have not responded to defendant's particular claim that the warrant was overbroad and are directed to do so. As stated above, the People are directed to disclose the affidavit to counsel or in the alternative, move for a protective order pursuant to CPL 240.50. A decision on defendant's motion to suppress any evidence recovered pursuant to the execution of the warrant is therefore reserved.

Wade:

Defendant has moved to suppress identification evidence noticed by the People in their Voluntary Disclosure Form. In their response, the People oppose defendant's motion and state that all of the witnesses have a prior relationship with the defendant and that these relationships are sufficient to ensure that there is little or no risk of the witnesses identifying the wrong person. The People ask the Court to reach this same conclusion based upon the evidence before the grand jury. Essentially, the evidence presented to the grand jury shows that the defendant's

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relationship with each of the complainants was limited to the incident itself. With respect to some complainants, that relationship may have been extended by a few more hours. The majority of the crimes charged in the indictment occurred in March and April of 2008, with some occurring earlier in 2005 and 2007. The identifications noticed by the People, in which the complainants viewed a single photograph of the defendant, took place in May and June of 2009 over one year later. The People have not revealed the identity of any of the witnesses, nor have they particularized to the defense the extent of each relationship and the duration of each incident. Without this information, defendant is unable to challenge the existence of a prior relationship between himself and the identifying witnesses. Based on the record before the Court, a Rodriguez hearing is granted, which will be followed by Wade hearing if the hearing court finds that no prior relationship existed between the identifying witnesses and defendant. People v. Rodriguez, 79 NY2d 445 (1992); People v. Williams, 182 AD2d 490 (1st Dept 1992), *lv denied* 80 NY2d 897.

Sandoval application will be heard prior to trial.

This opinion constitutes the decision and order of the Court.

Dated: December 1, 2009
New York, New York

CHARLES H. SOLOMON, J.S.C.