SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: CRIMINAL TERM: PART 30

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

v.

DENNIS TAYLOR,

Defendant.

----------X

Present:
Hon. Elizabeth A. Foley

INDICTMENT
NO. 10242/13

DECISION
AND ORDER

Defendant moves "for an Order (1) disclosing the transcript of any and all search warrant and related proceedings; (2) controverting the search warrant pursuant to C.P.L. Article 690 and suppressing the evidence seized upon execution thereof pursuant to C.P.L. Article 710; (3) reserving defendant's right to make further motions pursuant to C.P.L. §255.20(3); and (4) for such other and further relief as this Court deems just and proper." After a review of the moving papers, the People's opposition, the pertinent Supreme Court file and relevant statutory and caselaw authority, defendant's motion is decided in accordance herewith.

Defendant argues the entry into his residence at 557 Nostrand Avenue Apt. 4f Brooklyn, New York by the police "was illegal because the search warrant was not supported by probable cause, was not consensual, and was not supported by exigent circumstances." Defendant further asserts the search warrant at issue is

overbroad, and impermissibly contains a so-called "no-knock" provision, *i.e.*, pursuant to C.P.L. §690.35(4)(b), a directive permitting the police to enter his home to conduct a search without first giving notice of authority or purpose thereof. Consequently, defendant contends all physical evidence recovered upon the execution of the search warrant must be suppressed.

The search warrant in dispute was issued on November 30, 2013 and was based upon an affidavit sworn to by a police officer, which contained information concerning the officer's personal observations, as well as information provided to him by the victim of a sexual assault, who was named in the affidavit. As appears on the record before the Court, in summary, it has been alleged that a 911 emergency call was placed by the victim at approximately 7:15am on November 30, 2013, shortly after defendant had allowed her to leave his apartment. Thereafter, the victim relayed the specifics of the sexual assault -- during which defendant choked the victim, possessed a sword, and forcibly raped her four separate times -- to a police officer, whereupon that officer responded to defendant's apartment at approximately 8:00am; when defendant opened the door, the officer placed defendant under arrest. The officer obtained a search warrant for defendant's residence the same day, seeking "forensic evidence related to said crime, including but not limited"). [*sic*] blood, fingerprints, fibers, hair samples,

tissue, clothing, bed sheets, a sword and serology evidence ... ." The People assert the search "yielded exactly what was sought" where "forensic evidence" could be found, namely bed sheets, a pillow case, clothing, condoms, "possible serology evidence" as well as a sword observed by the complaining witness, and according to defendant, items recovered include "a pillow case, bed sheets, a sword, and a condom."

As a preliminary matter, it would appear defendant's assertions that the People have "not provided the defense with [] any transcripts of the search warrant proceedings" and that the instant motion "is disadvantaged by incomplete search warrant materials" are without basis. As is recited in the search warrant itself, only "proof by affidavit" was supplied to the issuing court, and moreover, the People aver transcribed minutes of a proceeding such as described by defendant "do not exist." The Court notes that where sworn written statements are submitted in support of a search warrant application and are found to establish probable cause, there is no requirement that the issuing court inquire into the facts. *See, e.g., People v. Rivera*, 40 AD3d 1208 (3rd Dept. 2007), *lv denied*, 12 NY3d 858 (2009).

In addition, defendant's Notice of Motion recites that the request for relief should include an order "suppressing the physical evidence seized due to the

People not serving search warrant materials to defense counsel on time;" although counsel's supporting Affirmation alleges the Court directed the People to turn over search warrant materials by January 23, 2014 and "the People failed to provide Defense Counsel with search warrant materials until March 6, 2014", this request for relief is not advanced or otherwise addressed in the moving papers. As such, this request for relief -- in the nature of preclusion due to a purported disclosure violation -- is entitled to no further consideration because it is merely asserted in conclusory fashion. Moreover, the Court finds there was no inordinate delay by the People in turning over search warrant materials, and upon this record, the remedy of preclusion is unwarranted.

Defendant's claim the search warrant is not founded upon probable cause is without merit. Here, the citizen informant was not anonymous, paid, or confidential, but was instead the complaining witness, identified by name in the deponent police officer's affidavit. In the Court's view, upon all the circumstances presented, the search warrant was supported by probable cause, as the issuing court determined. *People v. Hicks*, 38 NY2d 90 (1975); *People v. Diaz*, 274 AD2d 589 (2nd Dept. 2000); *People v. Allen*, 209 AD2d 425 (2nd Dept. 1994), *lv denied*, 84 NY2d 1028 (1995); *People v. Bradley*, 147 AD2d 578 (2nd Dept.), *lv denied*, 74 NY2d 805 (1989).

Defendant also asserts the language of the search warrant which authorized

the police to search defendant's apartment for forensic "evidence related to said crime, *including but not limited to* blood, fingerprints, fibers, hair samples, tissue, clothing, bed sheets, a sword and serology evidence" is overbroad and vague because the phrase "'including but not limited to' impermissibly sanctioned seizure beyond such items without limitation." In the Court's opinion, the search warrant itself is not overly broad or lacking in particularity, as the items sought are set forth with sufficient specificity, being connected to the crimes under investigation and alleged, and leaving no discretion to the executing officer.

The police were authorized to search for and seize "forensic evidence" from the interior of defendant's apartment, the entirety of which essentially constitutes a crime scene: an examination of the police officer's supporting affidavit reveals that upon defendant's entrance into his apartment accompanied by the complaining witness at about 3:30am November 30, 2013, defendant would not allow the victim to leave, first choking the victim into unconsciousness, after which the victim awoke on a couch and was ordered into the shower by defendant where the first in a series of sexual assaults occurred, followed by defendant placing a sword on the victim's lap and another sexual assault, then a final sexual assault occurred at approximately 7:00am before defendant permitted the victim to leave his apartment, all of which took place during a 3½ hour period in more than one area within the confines of defendant's residence. Based upon this

information, the search warrant was sufficiently particularized to enable the police to identify the items sought, and did not impermissibly allow the police to search defendant's apartment indiscriminately for "contraband" or other vaguely defined evidence of criminality at the executing officer's discretion. *See, generally, People v. Brown*, 96 NY2d 80 (2001). Incorporation of the phrase "including but not limited to" did not transform the disputed warrant into an authorization for a general search violative of either defendant's US Constitutional Fourth Amendment right to be secure against unreasonable searches, or the requirement that a warrant particularly describe things to be seized. Here, there was probable cause to believe "forensic evidence" would be found in defendant's apartment, not only of the type recited specifically in the search warrant, but when all the assertions of the police officer's supporting affidavit are considered, there was probable cause to believe more than the items described would also be found, and the warrant could not have been made more specific in its description of what "forensic evidence" was sought. *Compare, People v. Ambrozak*, 54 AD2d 735 (2nd Dept. 1974); *People v. Yusko*, 45 AD2d 1043 (2nd Dept. 1974); *People v. Armstrong*, 267 AD2d 120 (1st Dept. 1999), *lv denied*, 94 NY2d 945 (2000). However, even if the phrase complained of may be considered unconstitutionally broad, it may be redacted and the balance of the search warrant considered valid. In the Court's view, such severance is feasible because the warrant language is

largely specific and based upon probable cause, and the remaining portion of the search warrant has the required particularity. A partially valid warrant should not "be invalidated in toto merely because it erroneously permitted a search for additional items" without particularization. *People v. Brown, supra* at 85. Consequently, none of the items specifically described in the search warrant at issue are subject to suppression.

Turning to defendant's contention that the inclusion of a "no-knock" provision in the search warrant was error, the Court has carefully examined the officer's affidavit and the resultant search warrant. The Court concludes the deponent officer did not request such a provision and the affidavit does not allude to the need for it, while the warrant specifies execution may be made "without prior notice of purpose or authority". Without addressing the fact that no sworn to request was made for a "no-knock" provision, the People nevertheless contend a factual basis exists for such a provision, *i.e.*, "the police knew that they were looking for forensic evidence, which can easily be destroyed [and] had reason to believe that there were weapons inside the apartment, namely a sword, and a sword was in fact recovered ... [and therefore] the no-knock provision in the warrant was legal."

As is applicable here, in executing a search warrant, the police must make a reasonable effort to announce their authority and purpose unless they obtain a

provision in the search warrant which permits them to dispense with that requirement. The grounds upon which such a provision may be included in a search warrant, supported by allegations of fact, are a reasonable belief that the property sought will be easily and quickly destroyed or disposed of if notice is given before entry into premises, or that the giving of notice may endanger the life or safety of the executing officer or other person. *See*, CPL §§690.35(4)(b), 690.40(2), 690.45(7), 690.50(1), (2)(b). The factors which the People urge in support of their argument that inclusion of a "no-knock" provision in the search warrant at issue was "legal" are simply not present in the officer's sworn application proffered to the issuing court. It would be improper to presume the intent was to seek such authorization or that the factors urged by the People were considered by the issuing court, particularly in light of the nature of the items described in the warrant in conjunction with the fact that defendant had already been arrested by the police, and such factors will not, by judicial *fiat*, be incorporated inferentially into the officer's affidavit and considered now. Upon the record before the Court, it would appear the insertion of a "no-knock" provision in the search warrant was not based upon any request therefor, and such insertion was not made upon appropriate considerations as prescribed by statute.

While there is no dispute defendant had been placed under arrest before a

search warrant was sought by the police, it is not at all clear what the circumstances were at the time and place the search warrant was executed. Defense counsel affirms "the premises were unoccupied," and the People affirm defendant "was inside the location at the time of the search warrant," yet the People also seemingly rely upon the authority of CPL §690.50(2)(a), which provides the police do not have to announce their authority or purpose if a target location is unoccupied, or reasonably believed to be unoccupied by the executing officer.

Here, the question becomes whether or not the police, in executing the search warrant, relied upon the "no-knock" provision in executing the search warrant. If they did not, any physical evidence recovered may not be subject to suppression; however, the warrant may be invalid if the police entered the target apartment unannounced, in reliance upon the "no-knock" provision which the Court finds was improperly inserted. The Court concludes the ultimate question, whether or not the otherwise valid search warrant is vitiated by the improper inclusion of a "no-knock" provision, may only be determined upon inquiry of the executing police officer concerning the circumstances at the time the search warrant was executed. Thus, a hearing shall be held on the limited issue concerning the circumstances at the time of the execution of the search warrant

challenged by defendant, and final resolution of the instant motion shall be held in abeyance pending such hearing. *See, People v. Sinatra*, 102 AD2d 189 (2nd Dept. 1984); *People v. Greenleaf*, 222 AD2d 838 (3rd Dept. 1996), *lv denied*, 87 NY2d 973 (1996); *People v. Parliman*, 56 AD2d 966 (3rd Dept. 1977); *People v. Taylor*, _ AD2d __, 2002 WL 465094 (S. Ct. Queens Co.); *but see, People v. Izzo*, 50 AD2d 905 (2nd Dept. 1975).

Accordingly, it is hereby

ORDERED, that the hearing as outlined herein shall be held at a mutually agreed upon date and time; and it is further

ORDERED, that resolution of defendant's motion to controvert the search warrant for his premises is held in abeyance pending a hearing and determination as outlined herein.

ENTER

Dated: June 23, 2014

_____
ELIZABETH A. FOLEY, J.S.C.