

People v Diven

2014 NY Slip Op 33769(U)

April 28, 2014

County Court, Westchester County

Docket Number: 14-0175

Judge: Barbara G. Zambelli

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<p>FILED AND ENTERED ON <i>Apr. 28</i> 2014 WESTCHESTER COUNTY CLERK</p>
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

CHARLES J. DIVEN, JR.

Defendant.

ZAMBELLI, J.

DECISION & ORDER

FILED
Indictment No.: 14-0175
NR
APR 28 2014
TIMOTHY C. IDONI
COUNTY CLERK
TY OF WESTCHESTER

The defendant has been indicted for grand larceny in the second degree allegedly committed on or about and between March 1, 2005 and July 21, 2009, in the County of Westchester. He now moves by notice of motion with supporting affirmation and memorandum of law for omnibus relief. The People's response consists of an affirmation in opposition and a memorandum of law. Upon consideration of these papers, as well as review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

1. MOTION TO DISMISS AS UNTIMELY

Defendant challenges the sole count of the indictment, grand larceny in the second degree, as time barred as commenced beyond the five year statute of limitations set forth at CPL §30.10(2)(b).¹ He submits that while this count alleges a continuing crime commencing in February 2005 and ending in April, 2010, that the only funds related to

¹It is noted that the defendant raised this same argument in his prior omnibus motion under Indictment No. 12-1215 and the Court denied his motion. However, the court ultimately dismissed the grand larceny in the second degree charge as related to victim Carlos Primiero for legally insufficient evidence, and the People represented that count, resulting in the instant indictment.

Carlos Primiero received by defendant after June 2008 was a check drawn to defendant's order in July, 2009 in the amount of \$160,000. Defendant submits that this check was authorized by Mr. Primiero and acknowledged by him before a notary public. Because of this, defendant argues that the People improperly elicited testimony from Mr. Primiero that he only consented to having the July 2009 check drawn to the defendant's order because the defendant told him he would give him the money from this check after he received the check. Defendant submits that the People should not have allowed Mr. Primiero to testify in derogation of his written agreement. As without the July, 2009 check, the last check defendant is alleged to have received on behalf of Mr. Primiero is from June 2008 and thus defendant submits that count one is untimely. Defendant argues that the issue is not one of legal sufficiency, as the Court had held in its prior determination of this issue under Ind. No. 12-1215, because this is not a case where "an oral statement of one witness [is] contradicted by that of another". Instead, defendant argues that because the witness' testimony was in derogation of his signed, notarized written agreement, this is not a case where the evidence before the grand jury should be construed in the light most favorable to the People.

The People oppose the motion. The People argue that under the facts of this case, grand larceny was properly charged as a continuing crime and that the last disbursement made to Mr. Primiero from defendant's account occurred in July, 2009. They therefore submit that the count is clearly timely.

Defendant's argument that count one is time-barred is unavailing. Defendant's argument makes clear that he does not dispute that grand larceny in the second degree may be charged as a continuing crime and implies that the count would be timely but for

his factual dispute regarding the circumstances under which the July, 2009 check was issued. Indeed, "it is well established that grand larceny may be charged as a series of single larcenies governed by a common fraudulent scheme or plan even though the successive takings extended over a long period of time" (People v. Rosich, 170 A.D.2d 703 (2d Dept. 1991), lv. denied, 77 N.Y.2d 1000 (1991)). While defendant objects that this is not an issue of legal sufficiency because the witness testified in contravention of a written agreement, defendant offers no case law or any other authority for his position that the standard should be different in such a case and this Court is aware of none. Thus, despite that fact that defendant takes issue with Mr. Primiero's testimony, it must be accepted as true for the purposes of the grand jury proceeding. While defendant suggested herein that the People should have instructed the grand jury that "significant weight" must be given to the written agreement as opposed to the witness' oral testimony, defendant may raise that argument to the jury in any trial of this matter. In any event, it is noted that the People's theory is that Mr. Primiero was induced to enter into the written agreement by defendant under false pretenses.

Accordingly, count one was timely commenced within the applicable five year statute of limitations.

2. MOTION TO INSPECT/DISMISS/REDUCE

This application is granted to the extent that the Court has conducted an in camera inspection of the minutes of the grand jury proceedings. Upon review of the evidence presented, this Court finds that the indictment was supported by sufficient evidence and that the instructions given were appropriate. As to the testimony of the People's expert CPA and fraud examiner and defendant's objection to the expert's use of the word

“shortfall” to describe the difference between the monies received on behalf of Carlos Primiero and the amount defendant allegedly paid out to him, defendant’s objection is without merit. While defendant argues that the use of this term by an expert who is a certified fraud examiner expresses the expert’s opinion that the money is missing and was stolen, this argument is conclusory and speculative. The witness never alleged that the money was stolen but used the term “shortfall” to demonstrate the mathematical difference between what was deposited in the accounts on Carlos Primiero’s behalf and that which defendant paid out to him; ie., that what was paid out was less than what was put in. Contrary to defendant’s argument, this was a statement of fact based upon the witness’ analysis of the underlying bank records as opposed to impermissible opinion evidence. Given that this was substantiated by the underlying bank records in evidence, it cannot be said that the use of the term “shortfall” was prejudicial. To the extent that defendant objects to any charts used by the expert, given that the charts summarized the underlying bank records also in evidence, the charts were properly admitted under the voluminous writing exception to the best evidence rule (People v. Weinberg, 183 A.D.2d 932, 934 (2d Dept. 1992), lv. denied, 80 N.Y.2d 977 (1992)). It is further noted that the People properly instructed the grand jurors that the charts were offered solely for the purpose of assisting the grand jury in analyzing the bank records which were already in evidence, and that if they discovered a discrepancy between the chart and the bank records, as the finders of fact, it was their recollection of the facts and evidence which controlled (see People v. Shields, 100 A.D.3d 549, 551 (1st Dept. 2012)). There was no other infirmity which would warrant a dismissal of the indictment.

Accordingly, that branch of the motion which seeks dismissal of the indictment is

denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (CPL §210.30[3]).

3. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)

Granted on consent of the People to the extent that this Court directs that a hearing be held immediately prior to trial. Prior to the commencement of jury selection, the People will disclose to defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes (CPL §240.43). Defendant must then sustain his burden of informing the Court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf (People v. Matthews, 68 NY2d 118, 121-122). In the event the People seek to introduce defendant's prior bad acts on their direct case, the burden is on the People to seek a Ventimiglia hearing to determine the admissibility of such evidence (People v. Ventimiglia, 52 NY2d 350).

4. REQUEST FOR ADDITIONAL MOTIONS

The defendant's request for permission to make additional pretrial motions is denied. Additional motions will only be considered upon good cause shown pursuant to CPL §255.20(3).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
April 28, 2014



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE