People v Dearden
2015 NY Slip Op 32676(U)
September 3, 2015
Supreme Court, Westchester County
Docket Number: 14-1566
Judge: Susan M. Capeci

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

- against -

Indictment No: 14-1566

EMILY DEARDEN,
Defendant.

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CAPECI, J.,

The defendant, having been charged by indictment with attempted murder in the second degree (P.L. 110/125.25), assault in the first degree (P.L. 120.10 (1)), criminal possession of a weapon in the second degree (P.L. 265.03 (1)(b)), and four counts of criminal possession of a firearm (P.L. 265.01-b (1)), now makes this motion seeking omnibus relief.

The defendant has submitted an affirmation and reply affirmation from her attorney, with exhibits, in support of her omnibus motion, in which she seeks the following relief: 1) inspection of the grand jury minutes by the Court and the defendant, and thereafter, for the dismissal of the indictment and/or reduction of the charges contained therein; 2) suppression of a written record of an electronic communication (email) dated between August 20, 2013 and August 22, 2013, on the ground it was obtained in violation of P.L. 250.05 ("Eavesdropping"); 3) suppression of evidence seized from the defendant's home pursuant to a search warrant, on the ground that the police failed to leave an inventory of the property seized at the home; 4) disclosure of materials not previously provided through consent discovery, and Brady material; 5) a

Sandoval hearing; 6) an order precluding the People from offering any statements at trial that were not noticed to the defendant pursuant to CPL 710.30; and 7) a reservation of rights to make further pretrial motions as necessary.

The People have submitted an affidavit in opposition and memorandum of law, with an exhibit, in which they consent to provide discovery limited to the parameters of CPL article 240, as well as Brady material. They also consent to a Sandoval hearing, and an in camera inspection of the grand jury minutes by the Court to assess legal sufficiency, but otherwise oppose the motion. The Court now finds as follows.

1. 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 each count of the indictment was supported by sufficient evidence and that the instructions given were appropriate. There was no infirmity which would warrant a dismissal of the instant 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)).

2. MOTION FOR SUPPRESSION OF ELECTRONIC COMMUNICATION

The defendant seeks to suppress a two page email string, dating from August 20, 2013, to August 22, 2013, which the People provided as part of consent discovery. The email string is between two email addresses, neither of which are identified as belonging to the defendant. The defendant anticipates the People will claim the emails

are between her and an individual she was claimed to be having an affair with. She seeks suppression of the email string, arguing that it was obtained by Mr. Dearden through unlawful eavesdropping, in violation of P.L. 250.05.

The People respond that the defendant has not established standing to contest the admissibility of the email string, as she has not acknowledged that either email address used in the communication is hers, or that she was the sender or recipient of the emails. They contend she has thus not demonstrated that she is an "aggrieved person" under the controlling statutes. They further contend that she has no risk of self incrimination by asserting standing, since any such assertion cannot be used by the People in their direct case. Lastly, the People argue that the email string was not obtained in violation of any eavesdropping statute, since it was not obtained while in transit, but only after it had been stored.

As a preliminary matter, the Court finds that the defendant has failed to establish standing to contest the admissibility of the email string. "A defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched" (People v Leach, 21 NY3d 969, 971 (2013); see also People v Ramirez-Portoreal, 88 NY2d 99 (1996); People v Stanley, 50 AD3d 1066 (2d Dept 2008)).

With respect to email communications specifically, pursuant to CPLR 4506, an "aggrieved person" "may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom, on the ground that: (a) The communication, conversation or discussion was unlawfully overheard or recorded..." (CPLR 4506 (3)). CPLR 4506 (1) prohibits the contents of any overheard or recorded communication, conversation or discussion, or evidence

derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, from being received in evidence in any trial, hearing or proceeding before any court or grand jury (CPLR 4506(1); see also CPL 710.10 (4), CPL 710.20 (2) [authorizing a motion for suppression of evidence obtained by eavesdropping]). The proscriptions of CPLR 4506 apply not only to civil, but to criminal trials (People v Kirsh, 176 AD2d 652 (1st Dept 1991)).

As used in CPLR 4506, the term "aggrieved person" means:

"(a) A person who was a sender or receiver of a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of any instrument, device or equipment; or

(b) A party to a conversation or discussion which was intentionally overheard or recorded, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment; or

(c) A person against whom the overhearing or recording described in paragraphs (a) and (b) was directed."

CPLR 4506(2).

In this case, the defendant does not affirmatively maintain that she was either the sender or receiver of the email communications she seeks to suppress, or that either email account belonged to her so as to establish she was an aggrieved person under CPLR 4506. Although she contends that the assertion of standing on her part would result in self-incrimination, the Court finds this would not be the case under well-settled principles of law which have established that such an assertion in a suppression motion could not be used against her at trial on the People's direct case (see People v Wesley, 73 NY2d 351, 356 (1989) citing Simmons v United States, 390 US 377 (1968)).

Moreover, as pointed out by the People, any assertion of an objection on

constitutional grounds to the use of intercepted conversations obtained through eavesdropping devices is personal and limited to a party to the conversation or whose premises are involved (People v Butler, 33 AD2d 675 (1st Dept 1969); see also People v Caponigro, 163 AD2d 527 (2d Dept 1990)). Since the defendant has not asserted that either of the email accounts belong to her, or that she was the sender or recipient of the emails, she has not established a legitimate expectation of privacy in the emails to contest their admissibility.

In any event, even if the defendant had established standing to contest the admissibility of the emails at issue, she has not demonstrated that they were unlawfully obtained in violation of P.L. 250.05. The People assert that the email string dated August 20 to 23, 2013, was provided to them in late November 2013, by the victim, Mr. Dearden, who viewed and obtained them after their transmission from a stored email account at his own behest.

A person is guilty of eavesdropping pursuant to P.L. 250.05, when "he unlawfully engages in...intercepting or accessing of an electronic communication." The term "intercepting or accessing of an electronic communication" is defined in P.L. 250.00 (6) to mean the "intentional acquiring, receiving, collecting, overhearing, or recording of an electronic communication, without the consent of the sender or intended receiver thereof, by means of any instrument, device or equipment..." (P.L. 250.00(6)).

In Gurevich v Gurevich, (24 Misc3d 808 (Sup. Ct, Kings Co. 2009) (Sunshine, J.)), the court found there was no violation of P.L. 250.05 where the wife accessed emails from her husband's stored email account. The court interpreted this particular statute as prohibiting the interception of emails while in transit from one person to

another, but not containing any bar against obtaining emails that have been stored in an email account. The Gurevich court, also relying on Moore v Moore (NYLJ, August 14, 2008 at 26, col. 1, Sup. Ct, NY Co.) which reached the same conclusion, found the purpose of Penal Law 250.05, in light of the relevant legislative history, is to prohibit the interception of communications, in this case emails, going from one person to another.

Here, the defendant's husband obtained the emails in question from an email account after they had been stored, not while they were in transit (compare People v Hildreth, 86 AD3d 917 (4th Dept 2011) (conviction under P.L. 250.05 upheld where defendant had installed a program designed to record emails on the victim's computer and then send a report of those emails). As noted in Gurevich, obtaining stored emails may possibly violate some other statute, but since there was no "interception" it did not violate PL. 250.05. Accordingly, the defendant has not demonstrated that the email string was unlawfully obtained in violation of P.L. 250.05. The motion to suppress the email string is therefore denied.

3. MOTION FOR SUPPRESSION OF PHYSICAL EVIDENCE

The defendant seeks to suppress physical evidence recovered from her home pursuant to a search warrant, on the ground that the police failed to leave a written inventory of items taken, at the time the search was completed. The return of the inventory of items seized to the court was not made until December 11, 2013, three weeks later, which the defendant argues was improper.

CPL 690.50 provides that: "4. Upon seizing property pursuant to a search warrant, a police officer must write and subscribe a receipt itemizing the property taken and containing the name of the court by which the warrant was issued. If property is taken from a person, such receipt must be given to such person. If property is taken

from premises or a vehicle, such receipt must be given to the owner, tenant or other person in possession thereof if he is present; or if he is not, the officer must leave such a receipt in the premises or vehicle from which the property was taken" (CPL 690.50 (4)). The statute further provides that: "5. Upon seizing property pursuant to a search warrant, a police officer must without unnecessary delay return to the court the warrant and the property, and must file therewith a written inventory of such property, subscribed and sworn to by such officer" (CPL 690.50 (5)).

The defendant's motion to suppress physical evidence on this ground is denied. Courts have held that the failure of the police to provide a receipt at the time of the search is merely a ministerial error which does not taint an otherwise valid search (People v Morgan, 162 AD2d 723 (2d Dept 1990); People v Jenkins, 71 Misc2d 938 (City Ct., Mt. Vernon 1972)). Noncompliance with the return and inventory provisions of CPL 690.50 (5) similarly does not undermine the validity of the search warrant or the search (People v Fernandez, 61 AD3d 891 (2d Dept 2009)). The defendant's motion is therefore denied.

4. MOTION FOR DISCOVERY AND INSPECTION/ BRADY

The defendant acknowledges having been provided with consent discovery in this case. The defendant additionally seeks the production of any police reports, handwritten notes, memo pad entries or other documentation pertaining to statements alleged to have been made by the defendant, as noticed to her in the five separate CPL 710.30 notices provided by the People.

The People have consented, to the extent that any additional reports or notes containing statements by the defendant exist, to provide them to the defendant. This shall include any police notes or forms, of statements made by the defendant (People v

Utley, 77 Misc2d 86, 89 (County Ct, Nassau Co. 1974)). This motion is therefore granted on consent.

To the extent the defendant has demanded production of Rosario material at this time, such request is premature (see CPL 240.45(1); Catterson v Rohl, 202 AD2d 420 (2d Dept 1994)). The People have acknowledged their continuing obligation to provide exculpatory information to the defendant (Brady v Maryland, 373 US 83), and are directed to disclose any such information to the defense.

5. MOTION FOR A SANDOVAL HEARING

The defendant's motion for a Sandoval hearing is granted upon consent, and shall be renewed before the trial Judge.

6. MOTION FOR PRECLUSION OF STATEMENTS

The defendant's motion for preclusion of statements not noticed to her pursuant to CPL 710.30 is denied as premature, as the People are not presently seeking to offer any such statements at trial.

7. MOTION FOR RESERVATION OF RIGHTS TO MAKE FURTHER MOTIONS

Lastly, the defendant requests leave to make further pre-trial motions as necessary. The defendant's motion is denied. CPL 255.20 is controlling with respect to the time frame for making pre-trial motions and there have been no allegations of good cause for making further motions outside of those time constraints.

This decision constitutes the Order of the Court.

Dated: White Plains, New York
September 3, 2015

HON. SUSAN M. CAPECI
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