People v Fay
2017 NY Slip Op 31852(U)
August 23, 2017
City Court of Rye, Westchester County
Docket Number: 16-05037
Judge: Joseph L. Latwin
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CITY COURT : CITY OF RYE
WESTCHESTER COUNTY
---------- No. 16-05037

THE PEOPLE OF THE STATE OF NEW YORK,

-against- DECISION AND ORDER

BRYAN FAY,

Defendant.

APPEARANCES:
The People by Anthony A. Scarpino, District Attorney (Courtney Johnson, Assistant District Attorney)
Defendant by Anthony Keogh, White Plains, NY

Defendant is charged with DWI in violation of VTL 1192.3 and several VTL violations. Defendant moves for an Order: (1) for discovery and inspection pursuant to CPL 240; (2) limiting cross-examination concerning prior criminal conviction or immoral, criminal, or vicious acts; (3) suppressing statements; (4) suppressing use of evidence of refusal of a breath test, and (5) dismissing the charges based on willful destruction of evidence.

Discovery

"With respect to the principles of fundamental fairness which govern pre-trial discovery in criminal cases in this State, the Court notes that there is no general constitutional right to discovery in criminal cases under either the United States Constitution (*see, Weatherford v. Bursey*, 429 US 545, 97 SCt 837 [1977]) or the New York State Constitution (*see, Matter of Miller v. Schwartz*, 72 NY2d 869, 870, 532 NYS2d 354 [1988]). Moreover, it is beyond cavil that the courts possess no authority derived from the common law to order discovery (*see, People v. Colavito*, 87 NY2d 423, 426, 639 NYS2d 996 [1996]). Indeed, it is now well-settled law in this State that the exclusive authority of the courts to order discovery in criminal proceedings is governed by the terms of CPL Article 240 (*People v. Copicotto*, 50 NY2d 222, 225, 428 NYS2d 649 [1980]), which specifically identifies that material which is subject to discovery by the defense prior to trial to

the exclusion of that material which is not identified therein from the scope of discovery (*see, People v. Colavito, supra*, at 427; *Matter of Brown v. Grosso*, 285 AD2d 642 [2nd Dept], *lv. Denied*, 97 NY2d 605, 737 N.Y.S.2d 52 [2001]; *Matter of Pittari v. Pirro*, 258 AD2d 202, 696 NYS2d 167 [1999]; *Matter of Pirro v. LaCava*, 230 AD2d 909, 646 NYS2d 866 [2nd Dept 1996]). Stated succinctly, the courts do not possess the authority to grant pre-trial discovery in a criminal case where no statutory basis is provided in CPL Article 240 (*Matter of Sacket v. Bartlett*, 241 AD2d 97, 671 NYS2d 156 [1998]; *Matter of Pirro v. LaCava, supra*, at 910)." *People v. Denham*, 25 Misc.3d 1216(A), 901 NYS2d 909 (Table)[Sup Ct, Westchester County, 2009], *aff'd*, 97 AD3d 691, 948 NYS2d 392 [2nd Dept 2012], *leave to appeal denied*, 23 NY3d 1061, [2014].

Thus, to the extent the defendant's demand exceed the items those listed in CPL 240.20, the defendant's motion is denied. With respect to other requests:

1. Police reports - denied. *Brown v. Grosso*, 285 A.D.2d 642, 729 N.Y.S.2d 492 [2nd Dept, 2001].

5. Witness statements - granted to the extent that the People shall be provided in compliance with CPL §§ 240.44 & 240.45, and *People v. Rosario*, 9 NY2d 286 [1961]. *See also*, CPL § 240.10.

9. Criminal Record - granted to the extent that the People shall be provided in compliance with CPL §§ 240.44 & 240.45.

10. Identity of witnesses and Expert witnesses - Denied subject to the requirements of CPL §240.45(1)(a). A defendant is not entitled to pretrial disclosure of names and addresses of all potential prosecution witnesses as matter of right, where he presented no special circumstances for such disclosure, but simply asserted that it was necessary to prepare for trial. This is not to suggest that a trial court is precluded from granting such disclosure. To be entitled to relief, however, a defendant must first demonstrate a material need for such information and the reasonableness of the request. *People v. Miller*, 106 AD2d 787, 484 NYS2d 183 [3rd Dept, 1984]. *See also, People v. Andre W.*, 44 N.Y.2d 179, 186 n., 404 N.Y.S.2d 578 [1978]. Defendant here proffers no particular need for this information except to generally protect his rights to due process, to compel witnesses and receive the effective assistance of counsel.

Non-availability of the identity of witnesses has not always been the rule. Before 1936, witnesses names were required to be disclosed. The apparent intent of the New York State Legislature which in 1936 repealed the then Section 271 of the Code of Criminal Procedure which had required the names of witnesses to be endorsed on a felony indictment was that witnesses should be protected by not having their names revealed. It should be borne in mind that many witnesses in criminal cases are not protected and insulated by place of residence, knowledge and confidence as to how to avoid or disengage themselves from an improper approach by reason of access to their own attorneys for advice, and otherwise, as are more affluent members of society who less often are called as witnesses in criminal trials. Many of these noninsulated witnesses, by reason of the foregoing factors, are in a position where they can be intimidated by persons associated with the criminal element if their identity and place of residence are not kept secret until time of trial. *People v. Miranda*, 455 NYS2d 247 [Sup Ct, Bronx County, 1982] & *Vergari v. Kendall*, 76 Misc2d 848, 352 NYS2d 383 [Sup Ct, Westchester County] *aff'd*, 46 AD2d 679, 360 NYS2d 1003 (2nd Dept, 1974].

To the extent Defendant now requests discovery of those matters set forth in CPL 240.20 that have not as yet been disclosed, this motion is wholly unnecessary. Giving the People the benefit of the presumption that it has already offered to disclose or already has disclosed in good faith all of its file available, there should be nothing else subject to discovery. The policy of the District Attorney in this County is to permit open file discovery on the request of the defendant by appointment. It appears that an invitation of open file discovery was conveyed to defendant's attorney and he did avail himself of that offer. Furthermore, the Defendant has not alleged that any particular item has not been or would not be disclosed as part of the open file discovery. Accordingly, this request is denied provided that the People continue to provide (1) the offer of open file discovery remains; & (2) any discoverable items that it has in its files that have not been previously disclosed or that defendant specifically demands are made available.

Regardless of CPL 240.20, the People have a continuing obligation to provide exculpatory materials. Accordingly, the People shall provide all *Brady* and *Fein* materials. *Brady v. Maryland*, 373 US 83 [1963] and *People v. Fein*, 18 NY2d 162, 272 N.Y.S.2d 753 [1966].

Sandoval Hearing

The Court grants a *Sandoval* hearing upon consent of the People. CPL § 240.45 & *People v. Sandoval*, 34 NY2d 371, 357 NYS2d 849 [1974] insofar as the People are directed to serve upon the defendant and file with the court a list of all prior criminal convictions and/or bad acts of the defendant that they intend to use for cross examination purposes or upon their direct case at a trial of this action. Such list shall be served and filed at least seven days before the trial. *See, People v St. Thomas*, ___ Misc3d ___, 2011 NY Slip Op 31715(U) (Rome City Court June 27, 2011).

A hearing will be held before the trial judge before the commencement of jury selection. At such time, the court will determine which, if any, of said list may be used for such purposes at the trial of this action. The defendant is reminded that he will have the burden of informing the Court of those prior adjudications and convictions that he wishes to preclude, notwithstanding the defendant's right to require the prosecution to notify him/her of any uncharged bad acts that they intend to use at trial for impeachment purposes. *People v. Dokes*, 79 NY2d 656 [1992]); *People v Matthews*, 68 NY2d 118 [1986]; See *People v. Lee*, 73 A.D.3d 1085, 900 NYS2d 653 [2nd Dept. 2010].

Molineux-Ventimiglia Hearing

A *Molineux-Ventimiglia* hearing will be held before the trial judge before the commencement of jury selection. CPL § 240.43. If the People elect to attempt to use such evidence, they are to seek a preliminary ruling and hearing by this Court before introducing any evidence of the defendant's prior uncharged criminal, vicious, or immoral conduct. *People v Molineux*, 168 NY 264 [1901] *and People v. Ventimiglia*, 52 NY2d 350, 438 NYS2d 261 [1981]. See *People v. Sanchez*, 73 AD3d 1093, 900 NYS2d 679 [2nd Dept. 2010]; See also *People v. Rock*, 65 AD3d 558, 882 NYS2d 907 [2nd Dept. 2009].

Motion to Preclude Statements

The defendant seeks to preclude the statements of the defendant to the police. The defendant claims the statement was not voluntarily given since he was not afforded *Miranda* warnings before making the statement while in custody.

There are no factual allegations offered in support of this assertion. The People's Bill of Particulars states the arrest occurred at 2300. The first CPL 710.30 notice indicates *Miranda* warnings were given at 2345 and the statements made by defendant at 2355. The second CPL 710.30 notice indicates that defendant's statements were made at 1218 a.m. the next day.

In the absence of any specific facts, the Court cannot grant the motion to suppress, but rather, will hold a *Huntley* hearing pursuant to CPL 60.45.

With respect to the defendant's statements, the People have the burden of proving beyond a reasonable doubt that they were voluntarily made. It is manifest that a defendant who is in custody may not be interrogated by law enforcement without being advised of his constitutional rights. *Miranda v. Arizona*, 384 US 436, 86 SCt 1602 [1966]. "Both the elements of police custody and police interrogation must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*." *People v. Huffman*, 41 NY2d 29, 33, 390 NYS2d 843 [1976]. When a defendant is asked a question while in his vehicle, this was a temporary roadside detention for investigative questioning which is non-custodial in nature and did not require *Miranda* warnings. *(see People v. Mackenzie*, 9 Misc3d 129 [A] [App Term, 9th & 10th Jud Dists 2013]; *People v. Myers*, 1 AD3d 382 [2nd Dept 2003]. Also, defendant's statements while he was in custody, after he was clearly given his *Miranda* warnings and after being given those warnings, he indicated that he understood them and was willing to speak to the police would be admissible.

Suppression of refusal of breath test

Defendant claims he was never advised of the effect of a refusal of a breath test. There is no constitutional right to refuse to submit to a chemical test. *South Dakota v. Neville*, 459 US 553, 103 SCt 916 [1983]; *People v. Thomas*, 46 NY2d 100, 412 NYS2d 845 [1978], *app. dis*. 444 US 891, 100 SCt 197 [1979]; & *People v. Smith*, 18 NY3d 544, 942 NYS2d 426 [2012]. There is a statutory right to refuse. VTL § 1194(2)(b)(1) & *People v. Shaw*, 72 NY2d 1032, 534 NYS2d 929 [1988]. A defendant need not be advised of his/her right to refuse if he takes a breath test. *People v. Marietta*, 61 AD3d 997, 879 NYS2d 476 [2nd Dept. 2009]. "Although the defendant was not expressly advised that he had a right to refuse to take the test, there is no requirement that a defendant be so advised, and the absence of such an advisement does not negate consent otherwise freely given…."

VTL § 1194(2)(f) says

> *Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of section eleven hundred ninety-two of this article but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.*

Here, the Bill of Particulars says the Refusal warnings were given on 11/4/16 at 2345 by the arresting Officer. It does not include the precise wording of the warning given. Accordingly, the Court cannot determine whether or not the warnings given were "clear and unequivocal", *see, e.g., People v. Palencia*, 130 AD3d 1072, 15 NYS3d 89 [2nd Dep't, 2015] and the Court will hold a hearing before the commencement of jury selection on what warnings were given and whether or not they were sufficient.

Dismissal for Brady Violations

Defendant claims the police had a video tape that they turned over to the District Attorney's Office, but the video was not made available in open file discovery and it was not provided in response to defendant's demand. Defendant seeks a dismissal based on this failure to produce the video. Defendant argues that where demanded evidence has been destroyed, the defendant is entitled to an adverse inference charge. *People v. Handy*, 20 NY3d 663 [2013]. Indeed, such a charge is mandatory. *People v. Blake*, 24 NY3d 78 [2014].

In *People v. Handy*, 20 NY3d 663 [2013], there were two fights in the jail, two months apart. Surveillance captured portions of area of incidents. The defendant timely demanded production of videos, but both were destroyed due to routine tape over/re-using by facility per jail policy after 30 days. The defendant was convicted of one incident. The Court of Appeals (Smith, J.) held, "When a criminal defendant, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the state, the defendant is entitled to a permissive adverse inference instruction charge". *Cf., People v. Rosario*, 143 AD3d 1034 [2nd Dept. 2016] (No error in refusing to provide permissive adverse inference where no proof police conduct contributed to loss of text messages from informant's cell phone); *See also, People v. Butler*, 140 A.D.3d 1610 [4th Dept. 2016] (Failure to give adverse inference charge harmless error).

In the absence of any evidence that the police or the District Attorney's Office willfully destroyed or secreted a videotape of the defendant's arrest or field sobriety tests, dismissal is not yet warranted and the motion is denied. If such a videotape did exist, an adverse inference charge may be warranted.

The parties are invited to submit requests for instructions no later than 10 days before the trial. The parties are referred to the New CJI Instruction per *Handy* re "Destroyed Evidence".

The parties shall appear for a pretrial conference on September 5, 2017 at 900 at which time any hearings and a trial date shall be scheduled.

Dated: 23 August 2017

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JOSEPH L. LATWIN
Rye City Judge

Papers:
-Affirmation of Anthony J. Keogh dated July 14, 2017;
-Affidavit of Courtney L. Johnson unsworn and undated; &
-Reply Affirmation of Anthony J. Keogh dated July 14, 2017[sic].