

People v Hillary

2017 NY Slip Op 33063(U)

May 26, 2017

County Court, Westchester County

Docket Number: 16-1469

Judge: Barbara G. Zambelli

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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

- against -

MAY 30 2017 

Indictment No.: 16-1469

ERROL HILLARY,

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

-----X
ZAMBELLI, J.

The defendant has been indicted for murder in the second degree, criminal possession of a weapon in the second degree, attempted murder in the second degree (5 counts), assault in the first degree (4 counts) and assault in the second degree allegedly committed on or about December 25, 2016 in the County of Westchester. He now moves by notice of motion with supporting affirmation 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 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 all counts were supported by sufficient evidence and that the instructions given were appropriate. 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]).

2. MOTION FOR DISCOVERY AND INSPECTION / BRADY/ ROSARIO /GIGLIO

This application is granted to the limited extent of ordering that the People are to provide the defendant with materials and information, the disclosure of which is required pursuant to the provisions of CPL §240.44 and §240.45. The defendant's demand for disclosure of items or information to which he is entitled pursuant to the provisions of CPL §240.20(1) (a) through (l) is granted upon the People's consent. The application is otherwise denied as it seeks items or information which are beyond the scope of discovery and the defendant has failed to show that such items are material to the preparation of his defense (CPL §240.40 [1][a]).

The People are reminded of the continuing obligation to provide exculpatory information to the defendant (Brady v. Maryland, 373 U.S. 83). Exculpatory information includes any information that would be "favorable to the defense, material either to guilt or punishment, or affecting the credibility of prosecution witnesses," (People v. Baxley, 84 NY2d 208, 213). The People are directed to disclose any such information to the defense. Where a question exists as to whether a particular item should be disclosed, they are directed to submit the material or information to the Court, which will conduct an in camera examination to resolve the issue. To the extent that defendant seeks disclosure of agreements between the People and witnesses, the application is granted upon the People's acknowledgment of their duty to disclose same (Giglio v United States, 405 US 150). With regard to witness names and statements the defendant's application for same at this stage of the proceedings is denied. The People recognize their duty to comply with

People v. Rosario, 9 N.Y.2d 286; CPL §240.44, §240.45.

3. MOTION FOR A FURTHER BILL OF PARTICULARS

This motion is denied. The bill of particulars which was served pursuant to and simultaneously with the consent order was sufficient to adequately inform the defendant of the substance of his alleged conduct and to enable him to prepare and conduct a defense (People v. Byrnes, 126 AD2d 735, 736; see also People v. Watts, 84 NY2d 948; People v. Gargano, 222 AD2d 694; People v. Lopez, 175 AD2d 267). The information requested by defendant need not be disclosed (People v. Sanchez, 278 AD2d 889).

4. MOTION TO STRIKE IDENTIFICATION NOTICES

The defendant's motion is denied. The language in the notices served by the People in accordance with CPL §710.30 informed the defendant of the time, place and manner in which the identifications were made (CPL §710.30[1]; see People v. Lopez, 84 NY2d 425; People v. Hartley, 244 AD2d 712).

In the affirmation in opposition, the People contend that the defendant waived his right to challenge the sufficiency of the CPL §710.30 notices by moving in the alternative to suppress the identification procedures. However, a defendant may move in the alternative to suppress without waiving a preclusion claim, so long as the suppression claim is not litigated to a final determination (see People v. Kirkland, 89 NY2d 903; People v. Smith, 283 AD2d 189; People v. Figueroa, 278 AD2d 139; People v. Heller, 180 Misc2d 160; cf. People v. Smith, 8 Misc3d 441).

5. MOTION TO SUPPRESS IDENTIFICATION

The People noticed four identifications of the defendant - three from a "photograph" and one in person identification. However, while three identifications indicate that they are

from a "photograph", the People contend that the identifications made on December 25, 2016 at 8:14am and January 5, 2017 at 12:43pm were actually made from photo arrays and that they will amend said notices; the People further have produced the arrays to the defendant in consent discovery. Indeed, in his motion, defendant concedes that he was allegedly identified from "photographs, photo arrays and in person". Defendant argues that the in person identification as well as the identification from the single photo were inherently suggestive, and as to the photo array identifications, he submits that they were unduly suggestive.

The People oppose the motion and argue that the first identification was made by on the date of the incident, shortly after the crimes, at the scene of the arrest, by a witness who observed defendant shoot the victims and flee. The People submit that, without prompting by the police, this witness pointed out defendant as the perpetrator, chased defendant with the police and was present when defendant was apprehended and arrested. The People submit that there was no police arranged identification procedure. To the extent that this identification may be considered a "show up", the People argue that it was still properly made, as it occurred in close temporal and physical proximity to the crime after an unbroken chain of events. They also argue that, in any event, the identification was merely confirmatory as the witness knew defendant prior to the incident. The People further argue that this same witness also made the identification on December 28, 2016 from a single photo, and they also contend that this identification was merely confirmatory as the witness knew the defendant. As to the second and fourth identifications from photo arrays, the People dispute that these identifications were unduly suggestive. Lastly, the People argue that all witnesses have an independent source from

which to identify defendant based upon their views of him during the time of the alleged crimes.

Defendant's motion is granted insofar as, regarding the first and third identifications, a hearing shall be held immediately before trial as to whether the identification was merely confirmatory (People v. Rodriguez, 79 N.Y.2d 445), or in the alternative, whether any police procedures employed were unduly suggestive, and, if so, whether an independent source exists for an in-court identification by the witnesses (People v. Pacquette, 17 N.Y.3d 87; People v. McLemore, 264 A.D.2d 858). As to the second and fourth identifications, the motion is granted insofar as a hearing shall be held immediately before trial as to whether the police procedure employed were unduly suggestive, and, if so, whether an independent source exists for in-court identifications.

However, the People are directed to move to amend the identification notices for the second and fourth identifications by May 28, 2017 to reflect that they were made from photo arrays as opposed to photographs.

6. 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).

7. MOTION TO STRIKE SCANDALOUS MATTER

The defendant's motion to strike allegedly prejudicial language from the indictment is denied. The phrase "against the peace and dignity of the People of the State of New York" merely identifies the defendant's alleged acts as public, rather than private, wrongs (People v. Winters, 194 A.D.2d 703; People v. Gill, 164 A.D.2d 867).

8. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant seeks suppression of physical evidence recovered in this case on the grounds that he was illegally seized and searched by the police officers who were acting without a warrant, consent or reasonable suspicion or probable cause that he had committed a crime. He argues that his vehicle was improperly seized and searched. In support of his motion, he submits that his "conduct could only be described as innocent" without specifying what his conduct was.

The People oppose the motion and argue that it should be summarily denied for failure to allege facts in support thereof. They argue that, in any event, probable cause existed for defendant's arrest given that he was accused by an identified civilian witness as committing a crime. As to the evidence recovered, the People submit that defendant lacks standing to challenge the recovery of evidence from the crime scene, which included the gun and shell casings, and they further submit that such evidence was properly recovered by the police because it was abandoned and in plain view. The People allege that a search warrant was issued for the search of defendant's care, which warrant and affidavit have been provided to the defendant, but that no evidence was recovered therefrom.

No sworn allegations of fact are set forth in support of defendant's conclusory statement that the he was arrested without probable cause. While defendant twice alleges in his motion papers that he "avers facts with respect to their being no probable cause for [his] arrest", his papers, in fact, fail to include any such averments. Despite having sufficient information regarding the "factual predicate" for the arrest, as defendant admits to being in receipt of consent discovery and a bill of particulars, defendant failed to dispute the factual allegations herein. Accordingly, his motion on this ground is summarily denied (People v. France, 12 N.Y.3d 790 (2009); People v. Jones, 95 N.Y.2d 721; People v. Mendoza, *supra*; People v. Kemp, 262 A.D.2d 333; People v. Anderson, 253 A.D.2d 636; CPL §710.60[3][b]; see also People v. Scully, 14 N.Y.3d 861 (2010)).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
May 26, 2017



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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