People v Fernandez
2018 NY Slip Op 33698(U)
August 1, 2018
County Court, Westchester County
Docket Number: Ind No.: 17-1004-03
Judge: Anne E. Minihan
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FILED
AND ENTERED
ON 8-1 2018
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MICHAEL FERNANDEZ, ROBERT TORRES,
ANGEL RIVERA

Defendants.

---X

MINIHAN, A.

DECISION & ORDER
Ind No.: 17-1004-03

AUG - 1 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant ANGEL RIVERA, by Westchester County Indictment No. 17-1004-03, is charged, acting in concert with the codefendants (Michael Fernandez and Robert Torres), with Burglary in the Second Degree (Penal Law § 140.25[2]) (two counts), Grand Larceny in the Third Degree (Penal Law § 155.35[1]) and Petit Larceny (Penal Law § 155.25). Codefendant Fernandez is charged individually under the same indictment with Burglary in the Second Degree (Penal Law § 140.25[2]) and Grand Larceny in the Fourth Degree (Penal Law § 155.30[1]).

Defendant has filed an omnibus motion consisting of an Amended Notice of Motion and an Affirmation in Support, with exhibits. In response thereto, the People have filed an Affirmation in Opposition together with a Memorandum of Law.

Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order dated June 12, 2018, entered in this case, this Court disposes of this motion as follows:

A.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL ARTICLE 240

The parties have entered into a stipulation by way of a Consent Discovery Order consenting to the enumerated discovery in this case. Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to the Consent Discovery Order, they are to be provided forthwith.

As to the defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). The People have also acknowledged their duty to comply with *People v Rosario*, (9 NY2d 286 [1961]). In the event that the People are or become aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the Court to permit an *in camera* inspection and determination as to whether such must be disclosed to the defendant.

As to the defendant's demand for scientific related discovery, the People have acknowledged their continuing duty to disclose any written report or document concerning a physical or mental examination or test that the People intend to introduce, or the person who created them, at trial pursuant to CPL 240.20(1)(c).

Except to the extent that the defendant's application has been specifically granted herein, it is otherwise denied as seeking material or information beyond the scope of discovery (*see People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001]; *Matter of Brown v Appelman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994]).

B.

MOTION to CONTROVERT SEARCH WARRANTS

Defendant's motion to controvert the search warrants and to suppress physical evidence seized pursuant to the search warrants is denied. The results of a search conducted pursuant to a facially sufficient search warrant are not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). The Fourth Amendment to the U.S. Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I § 12 of the New York State Constitution contains identical language. Consistent with these constitutional provisions, CPL 690.45(4) requires that when a search warrant authorizes the seizure of property, the warrant must include "[a] description of the property which is the subject of the search." "To meet the particularity requirement, the warrant must be specific enough to leave no discretion to the police" (*see People v Cahill*, 2 NY3d 14, 41 [2003]). Upon review of the four corners of the search warrant affidavits, the warrants were adequately supported by probable cause, and sufficiently particular as to the place to be searched and the things to be seized (*see People v Keyes*, 291 AD2d 571 [2d Dept 2002]; *see generally People v Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v Elysee*, 49 AD3d 33 [2d Dept 2007]).

Moreover, it is relevant to note that no evidence was seized pursuant to the search warrant executed at defendant's apartment and that, in his motion, defendant does not assert a privacy interest in the apartment of codefendant Fernandez, or the vehicle, which were searched pursuant to the other search warrants. Thus, defendant has not met his burden of establishing standing to seek suppression of the evidence seized pursuant to the search warrants (*see People v Scully*, 14 NY3d 861 [2010]).

C.

MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

Defendant's motion is granted to the limited extent of conducting a hearing prior to trial to determine whether the identifying witnesses had a sufficient prior familiarity with the defendant as to render them impervious to police suggestion (*People v Rodriguez*, 79 NY 2d 445 [1992]). If the court finds that there was not a sufficient prior familiarity with the defendant on the part of a witness, the court will then consider whether or not the noticed identification was unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identification was so improperly suggestive as to taint any in-court identification. If an identification is found to be unduly suggestive, the court shall then consider whether the People have proven by clear and convincing evidence that an independent source exists for such witness' proposed in-court identification.

D.

MOTION to PRECLUDE UNNOTICED STATEMENTS and IDENTIFICATIONS

The court denies as premature defendant's motion to preclude the People from introducing at trial any statements and identifications which were not noticed. The People acknowledge the statutory requirements of CPL 710.30.

E.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct. The People have consented to a *Sandoval* hearing. Accordingly, it is ordered that immediately prior to trial a hearing shall be conducted pursuant to *People v Sandoval* (34 NY2d 371[1974]). At said hearing, the People shall be required to notify the defendant of all specific instances of his criminal, prior uncharged criminal,

vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach the defendant's credibility if he elects to testify at trial (CPL 240.43).

At the hearing, the defendant shall bear the burden of identifying any instances of his prior misconduct that he submits the People should not be permitted to use to impeach his credibility. The defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

To the extent defendant's application is for a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), it is denied since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of the defendant during its case in chief (*see People v Molineaux*, 168 NY 264 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

F.

MOTION for a SEPARATE TRIAL

Defendant moves pursuant to CPL 255.10(g) to sever his trial from that of the codefendants, arguing that a joint trial would be highly prejudicial because if the codefendants' statements are admitted into evidence and inculpate defendant, and if the codefendants choose not to testify, defendant would be unable to cross-examine them and would, thus, be deprived of the right of confrontation protected by the Sixth Amendment to the U.S. Constitution (*see Bruton v United States, 391 US 123 [1968]; Cruz v New York*, 481 US 186, 189-190 [1987]).

Whether to grant a separate trial is a matter vested to the sound discretion of the trial court (*People v Mahboubian*, 74 NY2d 174, 183 [1989]). Where, as here, the defendants are charged with acting in concert, and proof against the defendants is supplied by the same evidence, only the most cogent reasons warrant a severance (*see People v Bornholdt*, 33 NY2d 75, 87 [1973]). "Severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" (*People v Mahboubian*, 74 NY2d at 184). The court agrees with the People's position that defendant's motion for a severance should be denied as premature (*see Bruton v United States*, 391 US 123). After pretrial hearings as to the admissibility of the codefendants' statements, defendant may renew this branch of the motion on the *Bruton* issue.

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G.

MOTION to CONDUCT PRE-TRIAL HEARINGS TWENTY DAYS in ADVANCE of TRIAL

The defendant's motion to schedule pre-trial hearings twenty days prior to trial is denied. The hearings will be scheduled at a time that is convenient to the Court, upon due consideration of all of its other cases and obligations.

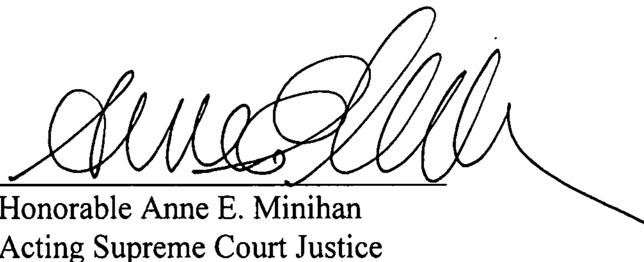
H.

MOTION for LEAVE to FILE FUTURE MOTIONS

This branch of the motion is denied. Any future motion must be brought by way of order to show cause setting forth reasons as to why said motion was not brought in conformity with CPL 255.20.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
~~July~~ , 2018
Aug. 1, 2018



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Acting Supreme Court Justice

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