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FILED
AND ENTERED
ON 8-13-2018
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Ind No.: 17-1004-02

MICHAEL FERNANDEZ, ROBERT TORRES,
ANGEL RIVERA

Defendants.

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FILED

AUG 13 2018

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

MINIHAN, A. J.

Defendant, ROBERT TORRES, by Westchester County Indictment No. 17-1004-02, is charged, acting in concert with the codefendants (Michael Fernandez and Angel Rivera), 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 a Notice of Motion, an Affirmation in Support, and a Memorandum of Law, 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 19, 2018, entered in this case, this Court disposes of this motion as follows:

A.

MOTION to INSPECT and to DISMISS and/or REDUCE
CPL ARTICLE 190

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment.

The defendant, who bears the burden of refuting with substantial evidence the presumption of regularity which attaches to official court proceedings (*People v Pichardo*, 168 AD2d 577 2d Dept 1990]), has offered no sworn factual allegations, in support of his argument

that the grand jury proceedings were defective. The minutes reveal a quorum of the grand jurors was present during the presentation of evidence, and that the Assistant District Attorney properly instructed the grand jury on the law, and only permitted those grand jurors who heard all the evidence to vote the matter (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). The Assistant District Attorney properly instructed the grand jury that any statements of the codefendants could not be considered as evidence against defendant (*see Bruton v United States*, 391 US 123 [1968]; *People v Johnson*, 27 NY3d 60, 67-68 [2016]).

The defendant's contention that the indictment should be dismissed because his arrest was allegedly illegal is without merit (*see People v Young*, 55 NY2d 419, 426 [1982]). Even assuming, solely for argument's sake, that defendant's arrest was illegal, an illegal detention cannot deprive the Government of the opportunity to prove a defendant's guilt with evidence wholly untainted by police misconduct (*see United State v Crews*, 445 US 463, 474 [1980]). "An illegal arrest, without more, has never been envisioned as a bar to prosecution" (*People v Young*, 55 NY2d at 426; *see United States v Crews*, 445 US 463, 474 [1980]).

Defendant argues for dismissal of the indictment on the basis that he was unduly prejudiced by the presentation of evidence to the grand jury on counts five and six, which charge only codefendant Fernandez with crimes. However, "a prosecutor is not required to present evidence of joinable crimes to separate Grand Juries" (*People v Edwards*, 240 AD2d 427, 428 [2d Dept 1997]). Here, the charges were properly joined (*see* CPL 200.40[1][c], 40.10[2][a], [b]). Thus, defendant's claim fails.

The evidence presented to the grand jury, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]). "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction" (*People v Mills*, 1 NY3d 269, 274-275 [2002]). Legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof (CPL 70.10[1]; *see People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]).

Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the

defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

B.

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).

Defendant's motion for a further Bill of Particulars is denied. The Bill of Particulars set forth in the Consent Discovery Order provided to the defendant has adequately informed the defendant of the substance of his alleged conduct and in all respects complies with CPL 200.95.

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]).

C.

MOTION for DISCLOSURE of DEALS and AGREEMENTS

The People recognize their continuing duty to disclose the terms of any deal or agreement made between the People and any prosecution witness at the earliest possible date (*see People v Steadman*, 82 NY2d 1 [1993]; *Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Wooley*, 200 AD2d 644 [2d Dept 1994]).

D.

MOTION to SUPPRESS PHYSICAL EVIDENCE & CONTROVERT SEARCH WARRANTS

This branch of defendant's motion is granted solely to the extent of conducting a *Mapp* hearing prior to trial to determine the propriety of any search resulting in the seizure of property otherwise retrieved not pursuant to the search warrants (*see Mapp v Ohio*, 367 US 643[1961]). The hearing will address whether defendant consented, and whether he has standing to challenge the places and/or items searched. The hearing will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

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]).

E.

MOTION to SUPPRESS IDENTIFICATION TESTIMONY
CPL 710

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

F.

MOTION to SUPPRESS NOTICED STATEMENTS

This branch of defendant's motion seeking to suppress statements on the grounds that they were unconstitutionally obtained is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a), were involuntarily made by defendant within the meaning of CPL 60.45 (*see* CPL 710.20(3); CPL 710.60[3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of defendant's Sixth Amendment right to counsel, and/or obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

G.

MOTION to PRECLUDE UNNOTICED STATEMENTS and IDENTIFICATIONS

To the extent that defendant is seeking to preclude the People from introducing statements and/or identifications at trial that were not noticed, that branch of the motion is denied as premature. The People acknowledge the statutory requirements of CPL 710.30.

H.

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 NY2d 264 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

I.

MOTION FOR A SEVERANCE

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]). The court may for good cause shown order that defendant be tried separately. Good cause includes a showing that defendant would be "unduly prejudiced by a joint trial" (CPL 200.40[1]). Where, as here, the proof against three defendants is supplied by the same evidence, only the most cogent reasons warrant separate trials (*see People v Bornholdt*, 33 NY2d 75, 87 [1973]; *People v Chaplin*, 181 AD2d 828 [2d Dept 1992]). "[S]trong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses" (*People v Mahboubian*, 74 NY2d 174, 183 [1989]). However, "[s]everance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is significant danger, as [the] 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).

Defendant's speculation that the codefendants will pursue an antagonistic defense is an insufficient basis to proceed with separate trials (*see People v Chaplin*, 181 AD2d 828 [2d Dept 1992]). Severance is also not warranted based on defendant's conjecture as to how the jury will consider the charges against only codefendant Fernandez.

However, the court grants defendant leave to renew his motion to sever after hearings as to all defendants on the issues of *Sandoval* and *Huntley,* and upon a showing that a joint trial will result in unfair prejudice to him and substantially impair his defense (*see Bruton v United States*, 391 US 123 [1968]; *People v Johnson*, 27 NY3d 60, 63 [2016]).

J.

MOTION for LEAVE to FILE FUTURE MOTIONS

This branch of defendant's motion is denied. Should defendant intend to bring further motions for omnibus relief, he must do so by order to show cause setting forth reasons as to why his motion was not and could not have been brought in conformity with CPL 255.20 (*see* CPL 255.20[3]).

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

Dated: White Plains, New York
August 10, 2018

Honorable Anne E. Minihan
Acting Supreme Court Justice

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