People v Joseph Ogilvie
2018 NY Slip Op 33742(U)
February 20, 2018
County Court, Westchester County
Docket Number: Ind. No. 17-1136-02
Judge: Larry J. Schwartz
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOSEPH OGILVIE and **TREMAINE GORDON**,

Defendants.

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FILED
FEB 21 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

FILED
AND
ENTERED
ON FEBRUARY 21, 2018
WESTCHESTER COUNTY CLERK

DECISION & ORDER

Indict. No. 17-1136-02

SCHWARTZ, J.,

Defendant, TREMAINE GORDON, having been indicted on or about November 6, 2017 for attempted murder in the second degree, as a felony (PL §110/125.25[01]), atempted assault in the first degree, as a felony (PL §110/120.10[01]), assault in the second degree, as a felony (PL 120.05[02], criminal possession of a weapon in the fourth degree, as a misdemeanor (PL §265.01[02]), has filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support and a Memorandum of Law. In response, 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 entered in this case, this court disposes of this motion as follows:

A. MOTION TO INSPECT, 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 indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

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, 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 evidence presented, 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 TO STRIKE & SUPPRESS IDENTIFICATION TESTIMONY PURSUANT TO CPL 710

The motion to strike the identification notices is denied. This motion to suppress 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 (*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 identification was 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.

C. 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]). 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.

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]).

D. 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 her 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 the defendant elects to testify at trial (CPL 240.43).

At the hearing, the defendant shall bear the burden of identifying any instances of her prior misconduct that he submits the People should not be permitted to use to impeach her

credibility. The defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to her 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]).

Defendant's application for a hearing, pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]) 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*, 68 NY2d 264 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

E. MOTION FOR DISCLOSURE OF AGREEMENTS

The People recognize their continuing duty to disclose the terms of any deal or agreement made between the People and any prosecution witness (see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.E.2d 215; *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.E.2d 104; *People v. Steadman*, 82 N.Y.2d 1, 603 N.Y.S.2d 382, 623 N.E.2d 509; *People v. Wooley*, 200 A.D.2d 644, 606 N.Y.S.2d 738, *appeal denied* 83 N.Y.2d 878, 613 N.Y.S.2d 138, 635 N.E.2d 307) at the earliest possible date.

F. MOTION TO STRIKE ALIBI NOTICE

Defendant's motion to strike the alibi notice is denied. Contrary to the defendant's contentions, it is well-settled that CPL 250.00 is indeed in compliance with the constitutional requirements (*see People v Dawson,* 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People v Gill*, 164 AD2d 867 [2d Dept 1990]) and provides equality in the required disclosure (*People v Peterson*, 96 AD2d 871 [2d Dept 1983]; *see generally Wardius v Oregon*, 412 US 470 [1973]).

G. MOTION TO STRIKE ALLEGED PREJUDICIAL STATEMENT FROM INDICTMENT

That branch of the defendant's motion seeking to strike the allegation "...and against the peace and dignity of the People of the State of New York" from the indictment is without merit and is denied (*see People v Winters*, 194 AD2d 703, 704 [2nd Dept 1993]).The foregoing constitutes the decision and order of this court.

H. MOTION TO CONDUCT PRE-TRIAL HEARINGS 20 DAYS BEFORE TRIAL

The defendant's motion to schedule pre-trial hearings 20 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 its other cases and obligations.

I. MOTION FOR A SERVERANCE

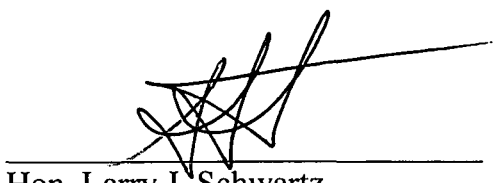
Defendant's motion for a severance from his co-defendant and for a separate trial is denied. Defendant presents no sworn allegations of fact or evidence to support the assertion that undue prejudice will result by joinder nor does he sufficiently particularize the reasons as to why he would be prejudiced by a joint-trial with his co-defendants. Defendant's speculation that a co-defendant would pursue an antagonistic or inconsistent defense is an insufficient basis to proceed with separate trials (*People v Chaplin*, 181 AD2d 828 [2d Dept 1992]). Defendant has failed to show good cause for severance (CPL 200.40 [1]).

The defendant was properly joined in the same indictment (CPL 200.40[1]). All charges in the incident arise out of the same criminal transaction and are related in time and location with both sets of offenses relying on the same evidence. The court may, however, 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]). Further, where the proof against all defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance" (*People v Bornholdt*, 33 NY2d 75, 87 [1973]; *People v Kevin Watts*, 159 AD2d 740 [2d Dept 1990]) and, ". . . a strong 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]).

Defendant's motion to sever on the ground of potential prejudice arising from a *Sandoval* ruling is denied as premature, with leave to renew after a *Sandoval* ruling, and upon a showing that a joint trial will result in unfair prejudice to him and substantially impair his defense. This court must determine whether the co-defendant's statements are admissible and if so, if it is possible to redact the co-defendant's statements and whether the co-defendants will be testifying at defendant's trial. Accordingly, the defendant's motion for a severance is denied as premature, with leave to renew upon a determination of the admissibility of co-defendant's alleged statements, and upon a showing that a joint trial will result in unfair prejudice to him and substantially impair his defense. Notably, a limiting instruction at trial would properly direct the jury to separately consider the proof as to each crime charged, thereby eliminating any prejudice to the defendant (*see People v Veeny*, 215 AD2d 605 [2d Dept 1995]).

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
February 20, 2018



Hon. Larry J. Schwartz
Westchester County Court Judge

To:

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