People v Frank Valencia
2018 NY Slip Op 33743(U)
April 30, 2018
County Court, Westchester County
Docket Number: Ind. No. 17-1068-01
Judge: George E. Fufidio

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

FRANK VALENCIA and JERRY REYES

Defendant.

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DECISION & ORDER
Indictment No. 17-1068-01

FUFIDIO, J.

Defendant, FRANK VALENCIA, having been indicted on or about December 18, 2017 on one count of acting in concert with co-defendant Jerry Reyes of criminal possession of a weapon in the second degree (Penal Law § 265.03[3] and one count of unlawful possession of a large capacity ammunition feeding device (Penal Law § 265.36). He is individually charged with four counts of attempted aggravated murder (Penal Law § 110/125.26[1][a][I]), four counts of attempted murder in the first degree (Penal Law § 110/125.25[1][a][I]), and one count of assault in the second degree (Penal Law § 120.05[3]) 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

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 grand jury was properly instructed (*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]).

Additionally, 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.

Counts 3-8 are not duplicitous. Each count charges only one offense (CPL § 200.30[1]; *People v Bauman*, 12 NY3d 152 [2009]). Furthermore, the various counts of attempted aggravated murder (counts 1, 3, 5, 7) and the various counts of attempted murder in the first degree (counts 2, 4, 6, 8) each relate to different victims and accordingly, do not charge the same offense (*People v Kindlon*, 217 AD2d 793 [3rd Dept 1995]).

The Defendant's claim that the, "statute defining the offense charged is unconstitutional or otherwise invalid," is too vague a claim and in any event lacks merit. The defendant's remaining contentions lack merit.

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]).

Furthermore, the portion of the defendant's motion requesting dismissal of the indictment for facial insufficiency under CPL 200.50(7)(a) is also denied. 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). In reading the language of the indictment on its own and in conjunction with the bill of particulars given to the defendant in consent discovery, it is clear that the indictment charges each and every element of the crimes and further meets the requirement that the defendant be given notice of the charges against him with respect to the time, place and manner in which the People allege the crimes were committed (*People v Albanese*, 45 AD3d 691 [2d Dept 2007], *People v Iannone*, 45 NY2d 589 [1978]).

B. MOTION TO SUPPRESS PHYSICAL EVIDENCE

This branch of the defendant's motion is granted to the extent of conducting a *Mapp* hearing prior to trial to determine the propriety of any search resulting in the seizure of property (*see Mapp v Ohio*, 367 US 643[1961]. The hearing will also address whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

Two search warrants were executed in this case. One was executed on September 26, 2017 on a black 2004 Volvo XC7 Wagon VIN YV1SZ59H841171528 located at Marshall Road and Ridge Drive in Yonkers, New York and the other on September 27, 2018 at Co-Defendant Frank Valencia's apartment at 43 Crestview Place in New Rochelle, New York and evidence was seized as a result.

Defendant moves to controvert these search warrants. Upon review of the four corners of the search warrant affidavit and order, the court finds that the warrants were adequately supported by probable cause (*see People v. Keves*, 291 AD2d 571 [2d Dept 2002]; *see generally People v. Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v. Elysee*, 49 AD 3d 33 [2d Dept 2007]). The warrant affidavits in support provided information that demonstrated probable cause to believe that evidence at the location could tend to show that the offense was committed. The defendant has failed to demonstrate that the warrant was based upon an affidavit containing false statements made knowingly or intentionally, or with reckless disregard for the truth (*People v. McGeahy*, 74 AD3d 989 [2d Dept 2010]).

To be addressed at this hearing is whether the defendant had a reasonable expectation of privacy in either location that was searched pursuant to the warrants so as to constitute standing to challenge the seizure of any physical evidence (*see Rakas v. Illinois*, 439 US 128 [1978]; *People v. Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v. Ponder*, 54 NY2d 10 [1981]; *People v. White*, 153 AD3d 1369 [2d Dept 2017]; *People v. Hawkins*, 262 AD2d 423 [2d Dept 1999]. If it is determined that the defendant had standing then a *Mapp/Dunaway* hearing will be conducted prior to trial to determine the propriety of the search resulting in the seizure of property (*Mapp v Ohio*, 367 US 643 [1961]).

C. MOTION TO STRIKE STATEMENT AND IDENTIFICATION NOTICES CPL ARTICLE 710

The motion to strike is denied. Said notices are in conformity with the statutory requirements of CPL 710.30. To the extent that the People intend to introduce identification evidence that was noticed to the Defendant beyond the 15 day requirement as mandated by CPL 710.30, a hearing will be held as to whether the People can make the requisite showing that they should be entitled to use the late noticed identifications.

D. MOTION TO SUPPRESS NOTICED STATEMENTS

This branch of the 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 the Defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a) were involuntarily made by the 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 the Defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

E. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY CPL ARTICLE 710

This motion is granted to the extent that a hearing shall be held to 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 FOR A *DARDEN/GOGGINS* HEARING

This motion is denied as moot. The People have indicated that they are not aware that any informant or undercover agent was involved in this case in any manner.

G. MOTION FOR HEARING 20 DAYS PRIOR TO TRIAL

This motion is denied. The hearings will be conducted immediately prior to trial. The defendant has shown no reason nor offered any authority why hearings should be held 20 days prior to trial.

H. 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. The 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 the 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.

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]).

I. 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 act, and vicious or immoral conduct (see, *People v Sandoval,* 34 NY2d 371[1974]). The People have consented to, and it is now ordered that immediately prior to trial the court will conduct a *Sandoval* hearing.

At the hearing, the People are required to notify the defendant of all specific instances of his

criminal, prior uncharged criminal acts and 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). The defendant shall then 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 him should he decide testify as a witness on his own behalf and thereby prevent him from exercising this right (*see*, *People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

Defendant's application for a *Ventimiglia* hearing is denied as premature, because the People have not indicated an intention to use any evidence of prior bad act or uncharged crimes of the defendant in its case in chief (*see, People v Molineaux*, 168 NY2d 264 [1901]; *People v Ventimiglia*, 52 NY2d 350 [1981]). The People have stated that if they do intend to use any *Molineaux* evidence that they will inform the defense and the court of their intention and at that point the defendant may renew this aspect of his motion.

J. MOTION FOR SEVERANCE

The defendant moves for a severance from his co-defendant. The defendant and his co-defendant, who are alleged to have acted in concert, are properly joined in the same indictment (see, CPL §200.40 [1]). Where the proof against defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance." (see, People v. Bornholdt, 33 NY2d 75, 87, cert. denied 416 US 95; see also, People v. Kevin Watts, 159 AD2d 740). Further, public policy strongly " favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witness . . . " (People v. Mahboubian, 74 NY2d 174, 183).

Nevertheless, or good cause shown, such as the fact that a defendant will be "unduly prejudiced by a joint trial", a defendant may be entitled to a severance from his co-defendant (see, CPL §200.40 [1]). In order to fairly evaluate whether the defendant will or will not be unduly prejudiced by a joint trial, decisions must first be rendered regarding the admissibility of any statement by the defendant's co-defendant as well as, if admissible, whether any such statement can be redacted. Further, consideration must be given as to whether the co-defendant intends to testify and whether the co-defendant's defense is antagonistic to the that of the within defendant.

Accordingly, as the court is yet to reach and resolve the above addressed matters, the defendant's motion for a severance is denied as premature with leave to renew and for the defendant to demonstrate, after the above matters have been resolved, that a joint trial will result in unfair prejudice to him and substantially impair his defense.

K. MOTION FOR DISCLOSURE OF *BRADY* MATERIAL

The People recognize their continuing duty to disclose exculpatory material at the earliest possible date (*see Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). If the People are or become aware of any material which is arguably exculpatory, but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its *in camera* inspection and determination as to whether such material will be disclosed to the Defendant.

L. MOTION RESERVING MORE TIME FOR FILING

ADDITONAL MOTIONS

Defendant's motion to reserve additional time to make additional motions in denied. The Defendant may make further motions upon the showing of good cause as to why they were not made here initially (CPL 255.20[3]; *People v Davidson*, 98 NY2d 738 [2002]).

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

Dated: White Plains, New York
April 30, 2018

Honorable George E. Fufidio
Westchester County Court Justice

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