People v David Potter
2018 NY Slip Op 33750(U)
July 2, 2018
County Court, Westchester County
Docket Number: Ind. No. 17-1086
Judge: Anne E. Minihan
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FILED
AND ENTERED
ON 7-2-2018
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

FILED
JUL - 2 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

-against-

DECISION & ORDER
Indictment No. 17-1086

DAVID POTTER and DONALD POTTER,

Defendant.

MINIHAN, J.

Defendant DAVID POTTER, by Westchester County Indictment No. 17-1086, is charged, acting in concert with the codefendant (Donald Potter), with Burglary in the third degree (Penal Law § 140.20), Grand Larceny in the third degree (Penal Law § 155.35[1]), Criminal Mischief in the second degree (Penal Law § 145.10), and Possession of Burglar's Tools (Penal Law § 140.35), and has filed this omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and a Memorandum of Law. The People 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 April 10, 2018, the court disposes of this motion as follows:

A.

MOTION to INSPECT, and to DISMISS 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 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

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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 that 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]; *see also People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). Contrary to defendant's contention, it was proper for the Assistant District Attorney to question him at the grand jury proceeding about certain prior convictions (*see People v Brims*, 145 AD3d 1025, 1027 [2d Dept 2016]; *People v Thomas*, 213 AD2d 73, 76-77 [2d Dept 1995], *affd* 88 NY2d 821 [1996]). The Assistant District Attorney properly instructed the grand jury that it could consider the evidence of defendant's prior convictions only as bearing on credibility (*see People v Rojas*, 97 NY2d 32, 38 [2001]; *People v Sandoval*, 34 NY2d 371, 376 [1974]) . Based on the foregoing, defendant's challenge to the propriety of the grand jury proceeding and the sufficiency of the evidence presented to the grand jury is baseless.

Upon the *in camera* review, this court does not find that release of the grand jury minutes or any portion thereof is necessary to assist it in making any determinations, and defendant has not set forth a compelling and particularized need for the production of the grand jury minutes. Thus, 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 are 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 defendant's demand for exculpatory material, the People recognize 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]). If the People are, or become aware of, any material which is arguably exculpatory and they are not willing to consent to its disclosure to defendant, they are directed to immediately disclose such material to the Court to permit an *in camera* inspection and determination as to whether such material must be disclosed to defendant.

Except to the extent that 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]).

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C.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant moves for a pre-trial hearing to determine whether, at trial, the People may cross-examine him, if he elects to testify, about his prior criminal convictions, and prior uncharged criminal, vicious, or immoral conduct. On the People's *consent,* the motion for a *Sandoval* hearing is granted (*see People v Sandoval* (34 NY2d 371 [1974]). At the hearing, the People must notify defendant of all specific instances of his criminal, and prior uncharged criminal, vicious, or immoral conduct of which they have knowledge and which they intend to use to impeach defendant's credibility if he testifies at trial (CPL 240.43). At the hearing, defendant shall bear the burden of identifying any instances of his prior misconduct which he submits the People should not be permitted to use to impeach his credibility. 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, 269 [2d Dept 1985]).

To the extent that defendant's motion seeks a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), that branch of the motion is denied as premature because the People have not indicated an intention to use in their case in chief any evidence of prior bad acts or uncharged crimes by defendant (*see People v Molineux*, 168 NY 264 [1901]). If the People move to introduce such evidence, defendant may renew that branch of the motion.

D.

MOTION to STRIKE STATEMENT NOTICES &
TO SUPPRESS NOTICED STATEMENTS

The People served defendant with two CPL 710.30(1)(a) notices of statements allegedly made by defendant to law enforcement. By moving to suppress those noticed statements, defendant waives his right to challenge the adequacy of the notices (*see* CPL 710.30[3]; *People v Kirkland*, 89 NY2d 903, 904-905 [1996]; *People v Merrill*, 226 AD2d 1045 [4th Dept 1996], *lv denied* 88 NY2d 1022 [1996]).

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 the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

E.

MOTION to CONTROVERT SEARCH WARRANTS

Defendant's motion 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]).

The defendant offers no sworn facts demonstrating that the search of the vehicle occurred prior to the application for the search warrant, thus, defendant's challenge to the search and seizure of the car and whether he even has standing to challenge same, since he has not demonstrated ownership or an expectation of privacy, is denied. Accordingly, defendant's motion to suppress physical evidence obtained as a result of the search warrants for the car and the cell phone is denied.

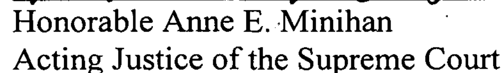
F.

MOTION to SUPPRESS PHYSICAL EVIDENCE

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 shall include determining whether the defendant has standing to challenge the suppression of the bag (and its contents) that was dropped by the defendant and/or co-defendant and whether the abandonment was precipitated by unlawful police conduct (*People v Martinez*, 80 NY2d 444 [1992]). 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]).

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

Dated: White Plains, New York
~~June~~ July 2, 2018



Honorable Anne E. Minihan
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