People v Scott
2018 NY Slip Op 33781(U)
April 9, 2018
County Court, Westchester County
Docket Number: 10-2018
Judge: Anne E. Minihan

[* 1]

FILED
AND ENTERED
ON 4-9 2018
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

FILED
APR 10 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER
Indictment No. 17-1324

DAMON SCOTT,

Defendant.

----------X

MINIHAN, J.

Defendant, DAMON SCOTT, having been indicted on or about January 3, 2018 for Murder in the Second Degree (Penal Law § 125.25 [1]), has filed an omnibus motion which consists of a Notice of Motion and an Affirmation in Support. 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, the court disposes of this motion as follows:

A.

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

The court grants 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 that 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 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]).

Defendant's request to dismiss the indictment pursuant to CPL 210.20 and 210.40 in furtherance of justice is denied. The defendant cites no persuasive or compelling factor, consideration, or circumstance under CPL 210.40 warranting dismissal of the indictment. The court has examined the factors listed in CPL 210.40, which include, in relevant part: the seriousness and circumstances of the offense; the extent of harm caused by the offense; the evidence of guilt; the history, character and condition of the defendant; any exceptionally serious misconduct of law enforcement personnel; the purpose and effect of imposing upon the defendant a sentence authorized for the charged offenses; the potential impact of a dismissal on public confidence in the judicial system; the potential impact of dismissal upon the safety and welfare of the community; and other relevant facts suggesting that a conviction would not serve a useful purpose. The court finds no compelling factor, consideration, or circumstance which clearly demonstrates that further prosecution or conviction of the defendant would constitute or result in injustice. Additionally, the court finds that release of the grand jury minutes, or any portion thereof, is not needed to assist the court in making any determinations. Defendant has not shown 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, thus, denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

B.

MOTION to DISMISS THE INDICTMENT for PRE-INDICTMENT DELAY and DENIAL OF DUE PROCESS

Defendant seeks to dismiss the indictment for delay in prosecution or, in the alternative, requests a hearing pursuant to *People v Singer* (44 NY2d 241 [1978]). Defendant argues that the period of over 9 years from the date of the crime, June 16, 2008, until the filing of the initial accusatory instrument, the felony complaint, on October 6, 2017, constitutes inexcusable delay violating his due process right to a speedy trial. Defendant was arrested in Georgia on September 20, 2017, and waived extradition to New York on December 1, 2017. On January 3, 2018, the indictment was filed.

The People argue that defendant fails to show a violation of his right to a speedy trial, or the need for a *Singer* hearing. The People contend that there was good cause for the delay given the seriousness of the murder charge, the need for additional evidence, and defendant's apparent attempt to evade

prosecution. The People note that defendant moved out of state, was arrested in Georgia, and allegedly provided a false name upon apprehension. The People point out that pursuant to CPL 30.10 (2)(a) the prosecution of a charge of murder in the second degree may be commenced at any time. The People argue that defendant has not shown that the prosecution was delayed to gain a tactical advantage.

A defendant's right to a speedy trial is guaranteed both by the United States Constitution (US Const 6th, 14th Amends; *Klopfer v North Carolina,* 386 US 213), and by statute (CPL 30.20 [1]; Civil Rights Law § 12). While New York's Constitution does not enumerate the right to a speedy trial, it does enumerate the right to due process and there are statutory speedy trial requirements under the due process doctrine (CPL 30.20; Civil Rights Law § 12). An unjustified delay in prosecution deprives a defendant of the New York constitutional right to due process (NY Const, art I, § 6; *People v Decker,* 13 NY3d 12, 14 [2009]). New York recognizes that "unreasonable delay in prosecuting a defendant constitutes a denial of due process of law" and that undue delay may require dismissal of the indictment, even when there is no resulting prejudice to the defendant (*People v Wiggins*, - NE3d -, 2018 NY Slip Op 01111 [2018], *citing*, *People v Staley*, 41 NY2d 789, 791 [1977]). In *People v Singer*, the court acknowledged, "[c]haracterization of the delay as 'preindictment' or 'postindictment' is often determinative," inasmuch as a claim of unconstitutional preindictment delay "generally requires a showing of actual prejudice before dismissal would be warranted" (*People v Singer*, 44 NY2d at 252 [internal citations omitted]). The *Singer* Court further held that "a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense" (*People v Singer* at 254). In preindictment delay cases decided after *Singer*, the Court of Appeals reiterated this principle (*see People v Decker*, 13 NY3d 12, 14 [2009]; *People v Vernace*, 96 NY2d 886, 888 [2000]).

"A determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant" (*People v Metellus*, 157 AD3d 821 [2d Dept 2018]). Where there has been extended delay, the People have the burden to establish good cause (*see People v Decker,* 13 NY3d at 14 [2009]). In determining whether a defendant's constitutional right to a speedy trial has been violated, the Court of Appeals has articulated five factors to consider: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charges; (4) any extended period of pretrial incarceration; and (5) any impairment of the defendant's defense (*see People v Romeo,* 12 NY3d 51, 55 [2009]; *People v Taranovich*, 37 NY2d 442, 444 [1975]). These factors are also relevant to the analysis of a due process claim (*see People v Decker*, 13 NY3d at 15 [2009]). No one factor or combination of factors is necessarily decisive; rather, each particular case must be viewed in light of all applicable factors (*People v Taranovich* at 445). In the instant case, the 9-year plus delay between the date of the crime and the filing of the accusatory instrument does not, by itself, warrant dismissal of the indictment (*see People v Jones*, 267 AD2d 250 [2d Dept 1990]; *see People v Larocca,* 172 AD2d 628 [2d Dept 1991]; *People v Hoff*, 110 AD2d 782 [2d Dept 1985]). However, a *Singer* (44 NY2d 241 [1978]) hearing is warranted to determine if the People had good cause for the delay. Accordingly, the defendant's motion is granted to the extent that a pretrial hearing shall be held pursuant to *People v Singer*.

C. & D.

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 CPL Article 240. If there are any further items discoverable pursuant to CPL 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 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]). 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.

As to 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 defendant adequately informs defendant of the substance of the alleged conduct and in all respects complies with CPL 200.95.

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]).

E.

MOTION to PRECLUDE IDENTIFICATION TESTIMONY
CPL 710

The motion to preclude identification testimony is granted *on consent* 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 a witness did not have sufficient prior familiarity with the defendant, the court will consider whether 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 consider whether the People have proven by clear and convincing evidence that an independent source exists for the witness' proposed in-court identification.

F.

MOTION to SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress all testimony relating to the 2002 Lincoln Town Car, including photographs, results of the inspection and forensic testing, and any evidence seized pursuant to a search warrant issued on June 19, 2008 arguing that the People failed to preserve the car as discoverable evidence. Defendant also moves to suppress evidence derived from the July 1, 2008, search warrant for historical data for the victim's cell phone and the July 10, 2008 search warrant for "real time" cell site data for the victim's cell phone, arguing that the evidence is the fruit of unlawful Grand Jury subpoenas issued in 2008 to Sprint-Nextel.

Defendant's motion is denied to the extent that it seeks to suppress physical evidence recovered pursuant to the execution of the three search warrants. 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]). To the extent that the defendant challenges the sufficiency of the search warrants, that argument also fails. Upon review of the four corners of the search warrant affidavits (both redacted and unredacted), provided to defendant on February 1, 2018, and the warrant orders provided with the consent discovery, 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 AD3d 33 [2d Dept 2007]). Specifically, with respect to the swabs seized and the results of the gun shot residue from the swabs and the notebook seized from the car both pursuant to the June 19, 2008 search warrant, the motion to controvert the search warrant is denied. The court has also reviewed the order and return related to the June 19, 2008 search warrant and finds them to be proper in all respects. The search warrant affidavits provided the issuing magistrate with ample probable cause to support their issuance. The defendant fails to demonstrate that the warrants were based upon affidavits containing false statements made knowingly or intentionally, or with reckless disregard for the truth (*People v McGeachy*, 74 AD3d 989 [2d Dept 2010]).

Defendant moves, in effect, to sanction the People for failing to preserve the Lincoln Town car, alleging, in sum and substance, spoliation of exculpatory evidence. The People deny that the car had any exculpatory evidence or that spoilation occurred. As the matter is not ready for trial and the motion to preclude testimony about the car and photographs of the car is evidentiary, those branches of the motion are denied as premature with leave to renew before the trial court.

Defendant's contention that the court should suppress the victim's cell phone records because they were obtained pursuant to Grand Jury subpoenas which were null and void, because they purported to be issued by a Grand Jury that was not convened, is unavailing. The victim's cell phone records were obtained through valid search warrants. Moreover, defendant does not have standing to challenge the admissibility of the victim's cell phone records, since he has no possessory or proprietary interest therein (*People v DiRaffaele*, 55 NY2d 234, 242 [1982]).

Defendant's motion to suppress is granted to the sole extent of ordering a *Mapp* hearing to be conducted prior to trial to determine the propriety of any search resulting in the seizure of property from defendant at the time of his arrest (*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]).

G.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant moves for a pre-trial hearing as to whether the People may inquire into the defendant's prior criminal convictions, and 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 the hearing, the People must 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 to impeach the defendant's credibility if he elects to testify at trial (CPL 240.43).

At the hearing, defendant will have 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 [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 in its case in chief evidence of any prior bad act or uncharged crime of the defendant (*see People v Molineaux*, 168 NY2d 264 [1901]). If the People move to introduce such evidence, defendant may renew this aspect of his motion.

H.

MOTION to STRIKE ALIBI NOTICE

Defendant's motion to strike the alibi notice is denied. Contrary to defendant's contention, 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]).

I.

MOTION to STRIKE PREJUDICIAL LANGUAGE

Defendant moves to strike certain language from the indictment on the grounds that it is surplusage, irrelevant or prejudicial. The language concluding the indictment merely identifies defendant's acts as public, rather than private wrongs and such language should not be stricken as prejudicial. That branch of the motion is denied (*see People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]; *People v Garcia*, 170 Misc. 2d 543 [Westchester Co. Ct. 1996]).

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

Dated: White Plains, New York
April 9, 2018

Honorable Anne E. Minihan
Acting Justice of the Supreme Court

To:

HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601
BY: Sharleen Bailon, Esq.
Assistant District Attorney

CLARE J. DEGNAN, ESQ.
The Legal Aid Society of Westchester County
Attorney for Defendant Scott
150 Grand Street, Suite 100
White Plains, New York 10601
BY: Harvey Loeb, Esq.
Associate Counsel