

People v Rodriguez

2019 NY Slip Op 33968(U)

July 29, 2019

County Court, Westchester County

Docket Number: 2017-1173

Judge: David S. Zuckerman

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT: COUNTY OF WESTCHESTER
STATE OF NEW YORK

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

FILED

AUG - 7 2019

**TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER**

Ind. Nos.: 2017-1173
2017-1172

JUAN RODRIGUEZ,

Defendant

-----X
ZUCKERMAN, J.

Defendant stands accused, previously with one other, Kristopher Jones, under Indictment No. 17-1173 of one count of Burglary in the Second Degree. As set forth in the Indictment, it is alleged that, on or about July 31, 2017, those Defendants, in Westchester County, New York, while aiding and abetting and acting in concert with each other and others, did enter or remain unlawfully in a dwelling with the intent to commit a crime therein. Defendant also stands accused Indictment No. 17-1172 of one count of Burglary in the Second Degree (Penal Law §140.25[2]). As set forth in that Indictment, it is alleged that, on or about August 4, 2017, Defendant, in Westchester County, New York, while aiding and abetting and acting in concert with another, did enter or remain unlawfully in a dwelling with the intent to commit a crime therein.

By Order to Show Cause dated June 24, 2019, with accompanying Affirmations and Exhibits, the People have moved to consolidate Indictment No. 2017-1173 and 2076-1172. In response, Defendant has

submitted an Affirmation in Opposition, dated July 12, 2019, opposing the sought relief, and the People have submitted a Reply dated July 19, 2019.

The motion is disposed of as follows:

FACTS

It is alleged in Indictment No. 2017-1173 that, on July 31, 2017, at about 11:20 p.m., Defendant and three others--Rajid Dailey, Kristopher Jones, and Divine Wiltshire--unlawfully entered an apartment building located at 108 Highland Avenue, Yonkers, New York, as part of a scheme or plan to break into this and other apartment building laundry rooms, and using specialized tools break into the cash machines used for loading credits onto laundry cards which are present therein (hereinafter "AVM Machine") to steal cash from them. The People allege that Defendant was observed on surveillance video, at that date and time, looking into the laundry room briefly, before going off camera. Defendant had thick-framed glasses, a beard, a dark hooded sweatshirt with a white zipper, and black rounded shoes. Shortly after Defendant left the view of the camera, Dailey, Jones and Wiltshire were observed entering the room; Wiltshire covered one overt surveillance camera, but a covert camera observed those defendants breaking into the AVM with tools, and removing, counting, and dividing up cash (small bills under \$20) removed from the AVM.

It is also alleged in Indictment No. 2017-1172 that, on August 4, 2017, at about 3:25 a.m., Defendant was observed by a

surveillance camera outside of an apartment building located at 272 South Broadway, Yonkers, New York, also as part of the above-described scheme to break into apartment building laundry rooms and the AVMs contained therein. The People allege that Defendant was observed on the surveillance video with the same beard, dark hooded sweatshirt with white zipper, and black rounded shoes as during the July 31, 2017 incident. Surveillance cameras further observed Defendant enter the building vestibule where he pulled hard on a locked door, and then while waiting for a period in the vestibule he was observed pressing several apartment doorbells before leaving. Defendant was then observed on surveillance camera returning to 272 South Broadway, Yonkers, New York at 3:37 a.m., accompanied by Dailey and Maurice Smith. The three re-entered the building vestibule and again pressed apartment doorbells until, at about 3:46 a.m., Defendant gained entry to the building by entering while another tenant exited. Defendant then opened the door for Dailey (Smith remained outside), and Defendant and Dailey went to the laundry room. When they found the door to the laundry room locked, Dailey was observed on video dismantling a grate at the bottom of the door and crawling through the hole to enter the laundry room. Upon entering, and finding no AVM (the laundry machines were operated by quarters), Dailey was observed leaving the room; he and Defendant then went outside, met Smith, and left the area.

MOTION FOR CONSOLIDATION

The People move pursuant to CPL §200.20(2) to consolidate the instant indictments. CPL §200.20(2) provides

§ 200.20. Indictment; what offenses may be charged; joinder of offenses and consolidation of

2. Two offenses are "joinable" when:

(a) They are based upon the same act or upon the same criminal transaction, as that term is defined in subdivision two of section 40.10; or

(b) Even though based upon different criminal transactions, such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first; or

(c) Even though based upon different criminal transactions, and even though not joinable pursuant to paragraph (b), such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law; or

(d) Though not directly joinable with each other pursuant to paragraph (a), (b) or (c), each is so joinable with a third offense contained in the indictment. In such case, each of the three offenses may properly be joined not only with each of the other two but also with any further offense joinable with either of the other two, and the chain of joinder may be further extended accordingly.

In order to obtain consolidation of the indictments, the People must demonstrate "not only that the offenses charged in the separate indictments are joinable in accordance with the statutory criteria set forth in CPL §200.20(subd. 2) but also that combination for a single trial is an appropriate exercise of

discretion." *People v Lane*, 56 NY2d 1, 7(1982). The People, conceding that the two indictments allege separate criminal transactions, move primarily for joinder pursuant to CPL §200.20(c), arguing that the several "...offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law...." Generally, the People are correct regarding the similar nature of the two incidents--each charges acts involving breaking and entering into apartment buildings to steal cash from laundry cash machines (the AVMs) located therein.

Defendant in opposition fails to articulate and demonstrate any significant prejudice from consolidation. Rather he merely notes that the joined Indictment would consist of unrelated burglary incidents occurring on different dates, one of which is of dubious merit, and asserts, without more (i.e. an affidavit from Defendant), that Defendant "very likely" would testify in one, and not the other, incident.

Consolidation is not an improvident exercise of discretion where Defendant fails to demonstrate more proof on one incident than another, or a substantial likelihood that the jury would be unable to consider the proof in each incident separately. *People v McCune*, 210 AD2d 978 (4th Dept 1994), *ap den* 85 NY2d 864 (1995); *People v Foster*, 235 AD2d 490 (2nd Dept 1997), *ap den* 89 NY2d 985 (1997); *People v Asher*, 216 AD2d 309 (2nd Dept 1995), *ap den* 86 NY2d 789 (1995); *People v Hendricks*, 192 AD2d 552 (2nd Dept 1993), *ap den* 81 NY2d 1073 (1993). While the amount of direct proof in each is

somewhat different, there is nevertheless strong evidence of circumstantial guilt in Indictment #1173/2017. On balance, the apparently discrete and straightforward nature of each of the two incidents would appear to be "...easily segregable in the minds of the jurors...", making consolidation appropriate. *People v Gwathney*, 298 AD2d 526, 527 (2nd Dept 2002), *ap den* 99 NY2d 536 (2002); *People v West*, 86 AD3d 583 (2nd Dept 2003), *lv den* 17 NY3d 956 (2011).

The People also assert that the Indictments are properly joinable pursuant to CPL §200.20(2)(b), since proof of one of them would be material and admissible as evidence in chief upon a trial of the others. They allege that the two indictments are part of a common scheme or plan involving at least a half-dozen entries, in the same neighborhood, into apartment buildings; the entries, sometimes forced, into the laundry rooms therein; and the use of specialized tools to then effect entries into laundry cash machines, for the purpose of stealing cash from them. These incidents included, they also assert, Defendant, attired similarly, as lookout (Indictment #1173/17) or actually effecting entry to the building himself in a surreptitious manner, after which he allows another perpetrator into the building (Indictment #1172/17). Further, material and admissible evidence in each Indictment includes, significantly, that most of the witnesses in each would be the same as in the other. Crucially, the People also allege that proof of Defendant's acts in Indictment #172/17--namely his

numerous attempts to enter, his eventual surreptitious entry and allowing Dailey in, and their breaking into the laundry room together before abandoning their scheme because there was no AVM there--explains defendant's brief appearance on camera in Indictment #1173/17, as the acts of a lookout assisting others to commit their break-in, rather than an innocent passer-by. Therefore, the Indictments are also joinable under CPL §200.20(2)(b). *People v McLarin*, 157 AD2d 747 (2nd Dept 1990), *app den* 75 NY2d 921 (1990); *People v. Alston*, 264 AD2d 685 (1st Dept 1995), *ap den* 94 NY2d 876 (2000).

In sum, upon a balancing of the public interest in "...avoiding duplicative, lengthy and expensive trials against defendant's interest in being protected from an unfair advantage in favor of the People..." (*Lane, supra*, 8; *People v Gonzalez*, 229 AD2d 398 (2nd Dept 1996), *ap den* 88 NY2d 985 (1996); *People v Dean*, 1 AD3d 446 (1996), *lv den* 1 NY3d 596 (1996), and in the absence of any showing by Defendant that undue prejudice would result from a joint trial (*People v Moses*, 169 AD2d 786 (2nd Dept 1991), *ap den* 77 NY2d 964 (1991)), the People's motion to consolidate Indictments 2017-1173 and 2017-1172 is granted.

Accordingly, with regard to consolidation of Ind Nos. 2017-1173 and 2017-1172, it is hereby

ORDERED, that Indictment No.: 2017-1172 is consolidated into Indictment No.: 2017-1173; and it is further

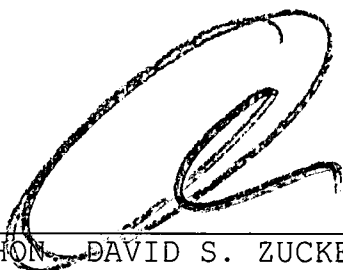
ORDERED, that Count 1 of Indictment No.: 2017-1172 is now

Count 2 of Indictment No.: 2017-1173, as newly consolidated herein;
and it is further

ORDERED, that the People are directed to file with the court
and serve upon Defendant, within 15 days of the instant Order, an
Amended Indictment which conforms to the consolidation of 2017-1172
into Indictment No.: 2017-1173 as Ordered herein.

The foregoing constitutes the Decision and Order of the
Court.

Dated: New City, New York
July 29, 2019



HON. DAVID S. ZUCKERMAN, J.C.C.

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