People v Daniels
2019 NY Slip Op 34400(U)
July 2, 2019
County Court, Westchester County
Docket Number: Indictment No. 19-0332-10
Judge: Anne E. Minihan

[* 1]

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

WALTER DANIELS a/k/a "T," KEITH HOLLAR a/k/a "BLAZE," JOSHUA QUINONES a/k/a "H," JAMES HEWLIN a/k/a "TEEKO" a/k/a "TEEKUS," ROY ROGERS a/k/a "FOX," LEON BROOKS a/k/a "ZACK," SAMUEL FORBES a/k/a "JUNIOR," RODERICK RIVERS a/k/a "JUJU," EDVIN MORALES, **WILLIAM RUTHERFORD a/k/a "UNIQUE,"** VICTOR JUSTICE a/k/a "VIC," LAMONT KILLIAN

Defendant.

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DECISION & ORDER
Indictment No. 19-0332-10

MINIHAN, J.

Defendant is charged by Westchester County Indictment Number 19-0332-10, acting in concert with all other codefendants, with Enterprise Corruption (Penal Law § 460.20) and Conspiracy in the Fourth Degree (Penal Law § 105.10[1]), and is charged separately with Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]), and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (two counts), and 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, 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 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, 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]).

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 FOR HEARING ON VOLUNTARINESS OF
UNNOTICED STATEMENTS

The branch of motion seeking a pre-trial hearing on the voluntariness of any unnoticed statements is denied as premature. The People acknowledge that if the seek to impeach defendant with an unnoticed statement, and defendant challenges the voluntariness of the statement, a ruling by the court as to the voluntariness of the statement would be required (*see People v Maerling*, 64 NY2d 134, 140 [1984]; *People v Clemons*, 166 AD2d 363, 365 [1st Dept 1990]).

C.

MOTION to SUPPRESS UNNOTICED STATEMENTS & IDENTIFICATIONS

This branch of the motion, to preclude the People from introducing statements and identifications at trial that were not noticed, is denied as premature. The People acknowledge the statutory requirements of CPL 710.30.

D.

MOTION to CONTROVERT THE EAVESDROPPING WARRANT(S)

To the extent that defendant moves to suppress evidence obtained from eavesdropping warrants which did not target his cell phone, or intercept any communications to which defendant was a party, that branch of the motion is denied for lack of standing (*see* CPL 710.20, 710.10[5]). Defendant has no standing to be heard on matters involving GPS coordinates or telephone records of a third-party's device in which he has no reasonable expectation of privacy (*see People v Kramer*, 92 NY2d 529, 538-540 [1998]; *People v Anderson*, 149 AD3d 1407, 1408-1409 [3d Dept 2017] *lv. denied* 30 NY3d 947 [2017]).

With respect to the relevant eavesdropping warrants, dated October 4, 2018, October 18, 2018, October 31, 2018, and November 28, 2018, defendant moves to suppress all evidence obtained thereby on the grounds that: (1) the applications did not comply with CPL 700.15 (issuance), i.e., they lacked probable cause and did not show that normal investigative procedures were tried and failed; (2) the applications did not comply with CPL 700.20 (application), i.e., they relied on information from informants but did not satisfy the *Aguilar-Spinelli* test; (3) the warrants did not comply with CPL 700.30 (form and content), i.e., they did not minimize intercepted communications and authorized interceptions exceeding the geographic jurisdiction, and; (4) the recorded communications were not properly sealed in accordance with CPL 700.50(2),

The court has examined all of the relevant eavesdropping warrants, and supporting applications, and finds as follows:

Probable Cause & Normal Investigative Procedures (CPL 700.15)

"[T]he probable cause necessary for the issuance of an eavesdropping warrant is measured by the same standards used to determine whether probable cause exists for the issuance of a search warrant" (*People v Tambe*, 71 NY2d 492, 500 [1988]). Upon review of the four corners of the affidavits supporting the relevant eavesdropping applications, the warrants were adequately supported by probable cause. Specifically, there was probable cause to believe that the targeted phones were being used in the commission of the offenses designated in the warrants (*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]).

Pursuant to CPL 700.15(4) and 700.20(2)(d), a wiretap application must contain "[a] full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought" (CPL 700.15[4]; *see People v Rabb*, 16 NY3d 145 [2011]). The affidavits herein sufficiently set forth that normal investigative procedures were tried and failed to achieve the goals of the investigation (*see People v Rabb*, 16 NY 3d 145 [2011]).

Giving deference to the issuing court's findings, defendant's allegations provide no basis to alter the issuing court's determinations that normal investigative techniques were exhausted and that there existed probable cause for the warrants (*see Franks v Delaware*, 438 US 154, 171 [1978]; *People v Traymore*, 241 AD2d 226 [1st Dept 1998]).

Facts Supporting Application (CPL 700.20)

To the extent that defendant's motion seeks to suppress evidence obtained from the eavesdropping warrants on the basis that the supporting affidavits relied on facts supplied by informants, but did not satisfy the *Aguilar-Spinelli* test, the motion is denied. To the extent that the applications relied on information from informants, the applications demonstrated both the reliability of the informant(s) and the basis of the informant(s)' knowledge (*see Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]).

Minimization (CPL 700.30)

CPL 700.30(7) provides, in relevant part, that an eavesdropping warrant must contain "[a] provision that the authorization to intercept... shall be conducted in such a way as to minimize the interception of communications... not otherwise subject to eavesdropping" (CPL 700.30[7]). "The minimization requirement is rooted in the Fourth Amendment's ban upon unreasonable searches and seizures" (*People v Edelstein*, 54 NY2d 306, 309 [1981] *rearg. denied* 55 NY2d 878 [1982]). Minimization has been defined as a good faith and reasonable effort to keep the number of nonpertinent calls intercepted to the smallest practicable number (*People v Floyd*, 41 NY2d 245 [1976]). It is the People's burden to show the legality of the police conduct (*see People v DiStefano*, 38 NY2d 640, 652 [1976]). The People may satisfy that burden "by demonstrating that procedures were established to minimize interception of nonpertinent communications and that a conscientious effort was made to follow such procedures" (*People v Floyd*, 41 NY2d at 250).

Here, the People met their burden, demonstrating that the wiretap investigation was carried out with the appropriate procedures in place to minimize interception of nonpertinent communications pursuant to CPL 700.30(7) (*see People v Gjelaj*, 46 AD3d 911 [2d Dept 2007]; *People v Nelson*, 21 AD3d 1121, 1122 [2d Dept 2005]). The People kept the court apprised of their minimization efforts through regular progress reports pursuant to CPL 700.50(1). Defendant's motion papers made only a

conclusory challenge to whether the People met the minimization requirement, and failed to rebut the People's showing that the calls were properly recorded and sufficiently minimized.

Sealing (CPL 700.50)

To the extent that defendant moves for suppression of any intercepted communications on the ground that the sealing requirements of CPL 700.50 (2) were not satisfied, that branch of the motion is denied. CPL 700.50(2) provides, in pertinent part, "Immediately upon the expiration of the period of an eavesdropping... warrant, the recordings of communications... must be made available to the issuing judge and sealed under his directions" (CPL 700.50[2], 700.35[3]). "[T]he obligation to seal tapes arises at the expiration of the 30-day period of the warrant, and at the close of each extension thereafter granted" (*People v Weiss*, 63 AD2d 662, 663 [2d Dept 1978]). It is well settled that "the sealing requirement must be strictly construed to effectuate its purposes of preventing tampering, alterations or editing, aiding in establishing a chain of custody and protecting the confidentiality of the tapes" (*People v Gallina*, 95 AD2d 336 [2d Dept 1983]). In fact, CPL 700.50(2) does not require sealing of "the original" so long as the People identify "an" original and seal it, tampering, alteration, or editing of that original is prevented, and chain of custody of the original is also maintained.

To the extent that defendant's motion raises an issue as to sealing, the court finds that the People complied with their statutory requirement (CPL 700.50[2]). Notably, all of the sealing orders were signed on or before the date on which the subject warrant and/or extensions terminated.

Geographic Jurisdiction (CPL 700.05[4], 705.00[6]).

CPL 700.05(4) provides, in pertinent part, that an eavesdropping warrant may be issued by "any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed" (CPL 700.05[4]). Similarly, any supreme court justice may issue an order authorizing the use of a pen register and trap and trace device in the judicial district in which the order is to be executed (CPL 705.00[6]). An eavesdropping warrant is "executed" when and where telephonic communications are intercepted or heard (*People v Perez*, 18 Misc. 3d 582 [2007]; *see also United States v Rodriguez*, 968 F2d 130 [1992]). As long as the issuing court is in the jurisdiction of the execution, the location of the intercepted phone is not pertinent (*United States v Rodriguez*, 968 F2d 130 [1992]). Since all of the eavesdropping warrants were issued by New York State Supreme Court Justices in Westchester County and the place used by law enforcement to intercept the communications was located in Westchester County, the warrants were properly executed in the issuing jurisdiction.

Based on the court's full review of the subject eavesdropping warrants and supporting affidavits, the court finds that the warrants were properly issued and executed (*see* CPL 700.15 *et. seq.*) and, thus, denies defendant's motion to the extent that it seeks to controvert the warrants and to suppress any evidence obtained thereby.

E.

MOTION for an AUDIBILITY HEARING

This branch of the motion is granted on consent of the People, and a pretrial hearing is ordered to determine whether the relevant communications recorded pursuant to the eavesdropping warrants are so inaudible and indistinct that a jury must speculate as to their contents (*see People v Harrell*, 187 AD2d 453 [2d Dept 1992]; *People v Morgan*, 175 AD2d 930, 932 [2d Dept 1991]). Whether a recording should be admitted into evidence is within the discretion of the trial court (*People v Morgan*, 175 AD2d 930, 932 [2d Dept 1991]). This determination is to be made after weighing the probative value of the evidence against the potential for prejudice (*People v Harrell*, 187 AD2d 453 [2d Dept 1992]).

F.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

This branch of the defendant's motion is granted to the extent of ordering that a pre-trial *Mapp* hearing to determine the propriety of any search, not conducted pursuant to a warrant, 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]).

The court notes that defendant's cell phone was seized from his person, and was later searched pursuant to a search warrant of this court dated April 19, 2019. 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]). Defendant does not move to controvert the search warrant. In any event, upon review of the four corners of the search warrant affidavit and order, which have been provided to the defendant, the court finds that the warrant was 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]). Thus, to the extent that defendant seeks suppression of any evidence obtained pursuant to the search of his cell phone, that branch of the motion is denied.

G.

MOTION to PRECLUDE IDENTIFICATION TESTIMONY
CPL 710

Defendant moves to preclude identification testimony as to any noticed identification. The People advise that no identification procedure of defendant requiring notice pursuant to CPL 710.30 took place. Based on the foregoing, the motion to preclude is denied as premature.

H.

MOTION FOR a SEVERANCE and
FOR a SEPARATE TRIAL

The defendant moves for severance on the grounds that a joint trial with the codefendants, especially Walter Daniels, Keith Hollar, and Joshua Quinones, will unduly prejudice him because those codefendants face far more serious charges than he and it is likely that the jury will not be able to consider separately the proof as it relates only to him, and his comparatively minor role.

The defendant was properly joined in the indictment (CPL 200.40[1][d]). While the court may, in its discretion and for good cause shown, order that defendant be tried separately, defendant failed to demonstrate good cause for severance. 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]). "[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 failed to show that in a joint trial the jury would likely not be able to separately consider the proof as it relates to each defendant, or that he would suffer prejudice given the pattern of criminal activity alleged against the codefendants and his comparatively minor role (*see* CPL 200.40[1][d][iii]).

I.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant moves for a pre-trial hearing to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions, and prior uncharged criminal, vicious or immoral conduct. On the People's consent, the court orders a pre-trial hearing pursuant to *People v Sandoval* (34 NY2d 371 [1974]). At the hearing, the People shall be required to notify the 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 the defendant's credibility if he elects to testify at trial (CPL 240.43). The defendant shall 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 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 evidence of any prior bad act or uncharged crimes of the defendant during its case in chief (*see People v Molineaux*, 168 NY2d 264 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

J.

MOTION for TIME to FILE FUTURE MOTIONS

Except to the extent specifically granted herein, this branch of the motion is denied. Any future motion must be brought by way of order to show cause setting forth reasons as to why said motion was not brought in conformity with CPL 255.20.

K.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL ARTICLE 240

The parties have entered into a Consent Discovery Order dated April 26, 2019, consenting to enumerated discovery in this case. That branch of defendant's motion which seeks 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.

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]).

Dated: White Plains, New York
July 2, 2019

Hon. Anne E. Minihan, A.J.S.C.

To:

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