People v Garcia
2019 NY Slip Op 34408(U)
August 7, 2019
County Court, Westchester County
Docket Number: Indictment No. 19-0488
Judge: Anne E. Minihan

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No. 19-0488

JASON GARCIA a/k/a "MECCA-J"
MATTHEW BROWN a/k/a "DA-HOMIE," a/k/a "LB"
LAQUANNA KERSHAW a/k/a "Q" a/k/a "QUANNA"
CASSAUNDRA DUNHAM a/k/a "SAUN"
DAMIEN RICKARD a/k/a DAMIEN RICHARDSON
a/k/a "SOLDIER",

Defendants.

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MINIHAN, J.

Defendant, CASSAUNDRA DUNHAM a/k/a "SAUN", is charged by Westchester County Indictment Number 19-0488 as aiding, abetting, and acting in concert with codefendants, with attempted murder in the first degree (Penal Law § 110/125.27 [1][a][v]), conspiracy in the second degree (Penal Law § 105.15) and criminal possession of a weapon in the second degree (Penal Law §265.03 [3]). Defendant 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 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 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 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.

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

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]).

B.

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]).

C.

MOTION to SUPPRESS PHYSICAL EVIDENCE and
to CONTROVERT THE SEARCH and EAVESDROPPING WARRANTS

Defendant moves to controvert the search warrant of her residence and for her cell phone. 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 has standing to contest any property seized pursuant to the search warrant, and to the extent that the defendant challenges the sufficiency of the search warrant, that argument fails. Upon review of the four corners of the search warrant affidavit, 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]).

The defendant fails 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 McGeachy*, 74 AD3d 989 [2d Dept 2010]). The defendant has failed to make a substantial preliminary showing of cause for a *Franks-Alfinito* hearing (*Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]; *People v Novick*, 293 AD2d 692 [2d Dept 2002]). The Court has reviewed the affidavit in support of the search warrant for the defendant's residence and cell phone and finds that it did provide the signing magistrate with probable cause to believe that evidence could be located at the locations described in the warrants. The Court has also reviewed the orders and finds them to be proper in all respects.

Lastly, pursuant to the Consent Discovery Order, the People consented to provide defense counsel with copies of the search warrants and supporting affidavits. The People are directed to disclose the warrants and supporting affidavits, if they have not already turned them over; or to move for a protective order. Should the People move for a protective order, an *in camera* inquiry will be conducted prior to trial pursuant to *People v Seychel*, 136 Misc2d 310 [Sup. Ct. NY Co. 1987] as reaffirmed by the Court of Appeals in *People v Castillo*, 80 NY2d 578 [1992]).

Defendant also moves to suppress all communications intercepted pursuant to the eavesdropping orders dated February 28, 2019 and March 14, 2019, including any evidence resulting therefrom, on the basis that the seizure of property occurred in violation of defendant's Fourth Amendment rights and that the wiretap orders lacked probable cause for their issuance, were defective, and generally violated defendant's constitutional rights.

The court has examined all the eavesdropping warrants pertaining to the instant case and the affidavits in support thereof and finds the following:

Probable Cause

"[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 search warrant affidavits, 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]). The allegations in the instant motion provide no basis upon which this court should alter the earlier determinations that normal investigative techniques had been exhausted and that there existed probable cause as the issuing court's orders are given deference (*see Franks v Delaware*, 438 US 154, 171 [1978]; *People v Traymore*, 241 AD2d 226 [1st Dept 1998]). The applications and supporting papers established that there was probable cause to believe that certain phones were being used in the commission of the offenses designated in the warrants.

Normal Investigation Procedures

The affidavits sufficiently set forth the normal investigative procedures that had been tried and that had failed to achieve the goals of the investigation (*see People v Rabb*, 16 NY 3d 145 [2011]).

Minimization

New York Criminal Procedure Law Section 700.30 (7), requires that an eavesdropping warrant 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 under the Criminal Procedure Law (CPL 700.30 [7]). 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]). This court has analyzed defendant's contentions and the parties' submissions and has determined that defendant has failed to satisfy his burden to demonstrate that the eavesdropping warrants did not meet the requirements set forth in CPL 700.30 (7) since each warrant was supported by an affidavit that contained a provision explaining to the court the minimization procedure that would be followed throughout the course of the eavesdropping. The court was kept apprised of the People's minimization efforts through regular progress reports. The court finds that the People have satisfied their burden of making a prima facie showing of compliance with the minimization requirement (*see People v DiStefano*, 38 NY 2d 640 [1976]) and the defendant's motion to the extent it challenges the alleged failure to comply with the minimization requirement, it is denied.

Sealing/Inventory Notice

To the extent defendant moves for suppression of the contents of any intercepted conversations on the ground that the sealing requirements of CPL 700.50 (2) were not satisfied, it is denied. "Immediately upon the expiration of the period of an eavesdropping or video surveillance warrant, the recordings of communications or observations made pursuant to subdivision three of section 700.35 must be made available to the issuing judge and sealed under his directions" (CPL 700.50[2]). 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. All of the sealing orders were also signed on or before the date the warrants and/or extensions terminated. Defendant has failed to demonstrate any facts showing, how the People failed to comply with the statute. Based upon the People's submissions, the People wholly complied with the statutory sealing requirements pursuant to CPL 700.50 (2).

Geographic Jurisdiction

An eavesdropping warrant may be issued by "any justice of the supreme court of the judicial department . . . in which the eavesdropping device is to be executed" (CPL 700.05 [4].) Similarly, a 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 a New York State Supreme Court Justice in Westchester County and place used by law enforcement to intercept the communications was located in Westchester County, the warrants were properly executed in the issuing jurisdiction.

Therefore, the court finds that the eavesdropping warrants and supporting documents were proper in all respects, the defendant's motion is denied.

Notwithstanding the foregoing, this branch of defendant's motion is granted to the extent of ordering that a pre-trial *Mapp* hearing be held to determine the propriety of any search, not conducted pursuant to warrant, and to the extent that defendant establishes standing, which resulted 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]).

C.

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, 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 said hearing, the People shall be required to notify the defendant of all specific instances of her criminal, prior uncharged criminal, 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 she elects to testify at trial (CPL 240.43).

At the hearing, the defendant shall bear the burden of identifying any instances of her prior misconduct that she submits the People should not be permitted to use to impeach her credibility. The defendant shall be required to identify the basis of her belief that each event or incident may be unduly prejudicial to her ability to testify as a witness on her 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 the motion.

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 710

This motion is granted 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]). In the event the Court finds that there was not a sufficient prior familiarity with the defendant on the part of the witness, the Court will then 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 LEAVE to FILE FUTURE MOTIONS

This motion is denied. Should defendant intend to bring further motions for omnibus relief, she must do so by order to show cause setting forth reasons as to why her motion was not and could not have been brought in conformity with CPL 255.20.

Dated: White Plains, New York
August 7, 2019

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

To:
HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601
Attn: A.D.A. Cooper W. Gorrie

Richard Ferrante, Esq.
399 Knollwood Road
Suite 11
White Plains, New York
Attorney for defendant