People v Cherian
2019 NY Slip Op 34978(U)
November 18, 2019
County Court, Westchester County
Docket Number: Indictment No. 19-0472
Judge: George E. Fufidio

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

KRISTEN CHERIAN,

Defendant.

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FUFIDIO, J.

DECISION & ORDER
Indictment No.: 19-0472

Defendant, KRISTEN CHERIAN, having been indicted on or about August 7, 2019 for aggravated driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [2-a][a]), driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [3]) and operating a motor vehicle without headlights (Vehicle and Traffic Law § 375 [2]) has filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support and a Memorandum of Law. 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

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 minutes reveal 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.

The grand jury was properly instructed (*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]).

Additionally, the Defendant's claim that there was no basis for her arrest is belied by the grand jury minutes. In any event that is not one of the statutory grounds for dismissal (*Holtzman v Goldman*, 71 NY2d 565 [1988]) nor would it bar prosecution (*People v Young*, 55 NY2d 419 [1982]).

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. DENIAL OF EQUAL PROTECTION

While the Court tends to agree with the Defendant's reasoning, the simple fact is, as the Defendant even concedes, the plain language of CPL 216.00 (1) and CPL 410.91 says that she is ineligible for judicial diversion (*Majewski v Bradlbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]). Moreover, she offers no other construction of the statute that permits an alternative interpretation (*People v Zerafa*, 38 Misc3d 251 [Sup Ct, Kings County 2012, Ferdinand, J.]).

Simply because the District Attorneys in other counties in New York consent to allowing defendants charged with felony DWI cases into judicial diversion programs in contravention of what the law actually says, does not mean that the Westchester District Attorney, by adhering to the law and not consenting to judicial diversion for cases not specifically enumerated, has somehow denied this Defendant equal protection of the law. The Westchester District Attorney strictly adheres to what is a facially neutral guideline and such adherence survives constitutional scrutiny as long it is rationally related to a legitimate governmental interest (*People v Aviles*, 28 NY3d 497 [2016]). The Defendant has not shown that she is a member of a suspect class of people or that the District Attorney's decision impacts a fundamental right, that she would be entitled to have the law considered under the more protective "strict scrutiny" review (*id.*). Instead, her denial for consideration into the CPL 216.00 judicial diversion program is simply predicated on the fact that the crime by which she is charged does not fall under the list of crimes that are eligible for diversion and thus subject to a "rational basis" review that will find a law constitutional as long as it is rationally related to a legitimate governmental interest (*id.*). Here, the legitimate governmental interest is protecting the public from people who engage in behavior that is harmful to the public, such as driving drunk on public roadways, and one of the ways that this is accomplished is by imposing graduated driver's license suspensions that increases the length of the suspension for those convicted of felony DWI thereby keeping felon drunk drivers off the road longer. Not allowing suspected felony or even misdemeanor drunk drivers into the diversion program is rationally related to achieving that interest in that the more times a person drives drunk in a period of time the longer their license is suspended.

Additionally, a defendant does not have a Constitutional right to plea bargain (*People v Cohen*, 186 AD2d 843 [3rd Dept. 1992]), what she is entitled to in this regard is a fair trial, not a reduced charge or lesser sentence, which is an incentive of judicial diversion, simply because other people charged with a similar crime in other counties have been permitted into judicial diversion (*see, People v Humphrey*, 30 AD3d 766 [3rd Dept. 2006]). Accordingly, the Defendant has not been denied equal protection.

C. 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]). 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 the material must be disclosed to the defendant.

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]).

D. MOTION TO SUPPRESS NOTICED STATEMENTS

The 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 PRECLUDE BREATH TEST RESULTS
AND EXPERT TESTIMONY

Insofar as the Defendant is seeking to preclude the People from using the results of a blood alcohol breath test taken at the police station for "failure to provide...proper disclosure" the Court denies the motion as moot. As the People explain, the Defendant has been granted access through consent discovery of "any written report or document, or portion thereof, concerning a scientific test inclding the most recent record of inspection, or calibration...."

To the extent that she seeks to suppress the results of the breath test, the Court orders a hearing to determine whether the defendant expressly consented to the chemical test (*see eg, People v Atkins*, 85 NY2d 1007, 1008 [1995] and/or that it was administered in accord with VTL §1194 (2)(a) (*see People v Atkins*, 85 NY2d 1007, 1008 [1995]). Notably, the two hour limit set forth in VTL §1194(2)(a)(1) has no

application where a defendant expressly and voluntarily consents to a test as opposed to where a defendant is deemed to have consented (*People v Elysee,* 12 NY3d 100, 105 [2009][2]). In the event the court finds that the defendant was deemed to have consented, the court will then consider whether the two hour statutory criteria as set forth in VTL§ 1194(2)(a)(1) was followed.

The prong of this motion asking the Court to preclude the People's use of an expert witness is denied as premature. It is an evidentiary question better directed towards the trial judge if and when the People decide that they are going to be using an expert witness.

F. MOTION FOR *SANDOVAL* AND *VENTIMIGLIA* HEARINGS

The 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 act, and vicious or immoral conduct (see, *People v Sandoval,* 34 NY2d 371[1974]). The People have consented to, and it is now ordered that immediately prior to trial the court will conduct a *Sandoval* hearing.

At the hearing, the People are required to notify the Defendant of all specific instances of his criminal, prior uncharged criminal acts and 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 he elects to testify at trial (CPL 240.43). The Defendant shall then 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 him should he decide testify as a witness on his own behalf and thereby prevent him from exercising this right (*see*, *People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

The Defendant's application for a *Ventimiglia* hearing is denied as premature, because the People have not indicated an intention to use any evidence of prior bad act or uncharged crimes of the Defendant in its case in chief (*see, People v Molineaux*, 168 NY2d 264 [1901]; *People v Ventimiglia*, 52 NY2d 350 [1981]). The People have stated that if they do intend to use any *Molineaux* evidence that they will inform the defense and the court of their intention and at that point the Defendant may renew this aspect of his motion.

G. MOTION FOR HEARING TWENTY DAYS PRIOR TO TRIAL

This motion is denied. The hearings will be conducted immediately prior to trial. The defendant has shown no reason nor offered any authority why hearings should be held twenty days prior to trial.

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[2]Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of . . . breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood (*People v Elysee,* 12 NY3d 100, 105 [2009]).

H. MOTION RESERVING THE RIGHT TO FILE ADDITIONAL MOTIONS

Defendant's motion reserving the right to file additional motions is denied. Should the Defendant file any other motions that were not raised in his *Omnibus* motion, then they will need to be in compliance with CPL 255.20(2).

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

Dated: White Plains, New York
November 18, 2019

Honorable George E. Fufidio
Westchester County Court Justice

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