People v Perkins
2020 NY Slip Op 34775(U)
October 1, 2020
Supreme Court, Westchester County
Docket Number: Ind. No. 19-0980
Judge: Susan M. Capeci

[* 1]

FILED
AND
ENTERED
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WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER
Ind. #19-0980

-against-

FILED
OCT 06 2020
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

JEBOCKA PERKINS,

Defendant.

The defendant, charged by indictment with eight counts of criminal contempt in the first degree (P.L. 215.51(c)), makes this omnibus motion seeking: 1) inspection of the grand jury minutes by the Court and the defendant, and thereafter, for the dismissal of the indictment and/or reduction of the charges contained therein; 2) suppression of the statements alleged to have been made by him, or in the alternative, for a Huntley hearing; 3) suppression of physical evidence, including a lighter, on the ground that it was recovered as the result of his unlawful arrest based upon a lack of probable cause, or a Mapp/Dunaway hearing; 4) suppression of evidence of his identification, or a Wade hearing; 5) a Sandoval/Ventimiglia/Molineux hearing; 6) disclosure of any exculpatory or Brady material; 7) severance of counts 1 through 8 for trial; 8) a hearing on the audibility and admissibility of the audio files disclosed by the People; and 9) a reservation of rights to make further motions as necessary.

The People consent to an in camera review by the Court of the Grand Jury minutes for legal sufficiency and the release of the Grand Jury testimony to the defendant, consent to a Sandoval/Ventimiglia/Molineux hearing, to a Huntley hearing, and to an audibility hearing, but otherwise oppose the motion. The Court now finds as

follows.

1. MOTION TO INSPECT THE GRAND JURY MINUTES

AND TO DISMISS AND/OR REDUCE THE INDICTMENT

Defendant moves pursuant to CPL §§210.20(1)(b) and [c] to dismiss the indictment, or counts thereof, on the grounds that the evidence before the Grand Jury was legally insufficient and that the Grand Jury proceeding was defective within the meaning of CPL §210.35. The Court has reviewed the minutes of the proceedings before the Grand Jury.

Pursuant to CPL §190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's commission thereof (CPL §70.10[1]); People v Jennings, 69 NY2d 103 [1986]). "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 Bello, 92 NY2d 523 (1998); People v Ackies, 79 AD3d 1050 (2nd Dept 2010)). In rendering a determination, "[t]he reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt" (Bello, supra, quoting People v Boampong, 57 AD3d 794 (2nd Dept 2008-- internal quotations omitted).

The defendant contends that the indictment is facially insufficient to charge him with each of the 8 counts of criminal contempt in the first degree under P.L. 215.51 (c),

arguing that both the present offenses and the predicate offense must involve the violation of an order of protection requiring the defendant to stay away from the person or persons on whose behalf the order was issued. He argues that it is not sufficient to allege that the defendant violated an order of protection by any other means, such as by failing to stay away from the protected parties' home, school or place of employment, or by other means of contact such as telephone, to establish the offense of criminal contempt in the first degree as charged under P.L. 215.51 (c). He further contends that the indictment is defective since the special information that was filed to elevate the charges from criminal contempt second degree to a criminal contempt first degree, failed to establish that the predicate charge involved the violation of a "stay away" order of protection.

The People respond that that there is no requirement that the predicate offense have involved the defendant failing to stay away from the person of the protected party, but only that he or she violated a prior order of protection of the types specified in P.L. 215.51 (c) within the last 5 years. They further contend that the Grand Jury could find a rational basis for an inference of guilt from the facts charged.

A person is guilty of criminal contempt in the first degree pursuant to P.L. 215.51 (c) when:

"he or she commits the crime of criminal contempt in the second degree as defined in subdivision three of section 215.50 of this article by violating that part of a duly served order of protection, or such order of which the defendant has actual knowledge because he or she was present in court when such order was issued, under sections two hundred forty and two hundred fifty-two of the domestic relations law, articles four, five, six and eight of the family court act and section 530.12 of the criminal procedure law, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, which requires the respondent or defendant to stay away from the person or persons on whose behalf the order was issued, and

where the defendant has been previously convicted of the crime of aggravated criminal contempt or criminal contempt in the first or second degree for violating an order of protection as described herein within the preceding five years..." (P.L.§ 215.51 (c) [emphasis added]).

The indictment at issue uses the statutory language to charge the defendant with the elements of P.L. 215.51 (c) as to each of the offenses. As has been clearly noted by the Appellate Division, Second Department, it is a required element of this statute under subdivision (c), that the defendant have violated an order of protection requiring him to "stay away from the person or persons" on whose behalf the order was issued (see People v Dewall, 15 AD3d 498 (2d Dept 2005) [protected party must be present at time of violation of order of protection under P.L. 215.51(c)]). In Dewall, the evidence was deemed insufficient to support the charge of criminal contempt in the first degree under P.L. 215.51(c), where the defendant went to the home of the protected party when she was not present there (see also People v White, 188 Misc2d 394 (Sup Ct. NY Co. 2001) [telephone calls made to the protected party did not support the charge of criminal contempt in the first degree under P.L. 215.51(c)]).

The court's review of the both the Grand Jury minutes and the bill of particulars, and the inferences that logically flow from the facts contained therein, makes clear that the protected party was present at the time the defendant is alleged to have violated the order of protection in counts 1 through 5, thereby establishing there was legally sufficient evidence with respect to these charges. However, counts 6, 7 and 8 involve the defendant contacting the protected party, in violation of the order of protection, by telephone and by letter. As subdivision (c) requires the presence of the protected party at the time the defendant is claimed to have violated the order of protection, these

counts 6, 7, and 8, must be reduced to the lesser included offense of criminal contempt in the second degree, P.L. 215.50 (3) (see CPL 210.20 (1-a)); People v Stone, 169 Ad23d 1165 (3d Dept 2019)).

With regard to counts 1 through 5, the issue then becomes whether the predicate offense of criminal contempt in the second degree as set forth in the special information was required to have involved defendant's violation of an order to "stay away from the person or persons" on whose behalf the order was issued. The special information filed in this case indicated that the defendant was previously convicted, on December 19, 2017, of the crime of criminal contempt in the second degree (P.L. 215.50 (3)) in the Mount Vernon City Court.

The Appellate Division, First Department in People v Taylor (142 AD3d 465 (1st Dept 2016), stated that "it is undisputed that Penal Law §215.51 (c) requires proof that the prior conviction, like the instant offenses charged in the indictment, involved a violation of a stay-away order..." (People v Taylor, supra); see also People v Swartout, 7 Misc3d 549 (Sup. Ct, Tompkins Co., 2005)).

However, the court in People v Taylor (supra at 466) also noted that the element that defendant violated a stay away order was satisfied by reference in both the indictment and special information to the defendant's prior conviction of criminal contempt in the second degree under P.L. 215.50 (3), and by reference to his having violated P.L. 215.51 (c). By reference to these statutes, the necessary elements of the crime of criminal contempt in the first degree are thereby incorporated into the pleadings (Id.; People v Ray, 71 NY2d 849, 850 (1988); People v Cohen, 52 NY2d 584, 586 (1981)).

This is sufficient to comply with CPL 200.50 and to provide the defendant with fair notice of the accusations against him (People v Iannone, 45 NY2d 589 (1978); People ex rel Best v Senkowski, 200 AD2d 808 (3d Dept 1994)). The motion to dismiss the counts of criminal contempt in the first degree contained in counts 1 through 5 of the indictment as facially insufficient on this basis is therefore denied.

With respect to Defendant's claim that the Grand Jury proceeding was defective within the meaning of CPL §210.35, a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the Grand Jury on the law, that the grand jurors who voted to indict heard all the "essential and critical evidence" (see People v Collier, 72 NY2d 298 [1988]; People v Julius, 300 AD2d 167 [1st Dept 2002], *lv den* 99 NY2d 655 [2003]), and that the Grand Jury was properly instructed (see People v Calbud, 49 NY2d 389 [1980] and People v Valles, 62 NY2d 36 [1984]).

In making this determination, the Court does not find that release of such portions of the Grand Jury minutes as have not already been disclosed pursuant to CPL Article 245 to the parties was necessary to assist the Court.

2. MOTION TO SUPRESS STATEMENTS

The defendant has been served with a CPL 710.30 notice, with respect to an oral statement alleged to have been made by him on September 15, 2019, to members of the Mount Vernon Police Department. The defendant argues that this noticed statement should be suppressed as involuntarily made.

The defendant's motion for suppression of the above statement as set forth in the

CPL 710.30 notice is granted to the extent that the Court will conduct a Huntley hearing prior to trial concerning the noticed statements allegedly made by the defendant for the purpose of determining whether Miranda warnings were necessary and, if so, whether he was so advised and made a knowing, intelligent and voluntary waiver thereof, or whether the statements were otherwise involuntarily made within the meaning of CPL 60.45.

3. MOTION TO SUPPRESS PHYSICAL EVIDENCE/ PROBABLE CAUSE HEARING

The defendant's motion for a Dunaway/Mapp hearing on the issue of probable cause for his arrest and the subsequent recovery of evidence from his person is denied. The defendant has not set forth any allegations of fact in support of his conclusory statement of illegal arrest. In the absence thereof, no hearing is warranted on this ground (see People v Mendoza, 82 NY2d 415 (1993); CPL 710.60(3)(b)).

In any event, the defendant was arrested based upon information provided to police officers by an identified citizen, which was presumed reliable (People v Boykin, 187 AD2d 661 (2d Dept 1992); People v Newton, 180 AD2d 764 (2d Dept 1992)). Generally, such information is sufficient to provide the police with probable cause to arrest (see People v Williams, 301 AD2d 543 (2d Dept 2003); People v Phillips, 301 AD2d 495 (2d Dept 2001)). Any evidence recovered from his person was thus seized incident to his lawful arrest (People v Belton, 55 NY2d 49 (1982)).

4. MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

The defendant has been served with a CPL 710.30 notice with respect to an identification made of him from a single photograph on September 15, 2019, at the Mount Vernon Police Department. The People indicate in their papers in opposition that the identification was made by the victim in this case, who had been in a relationship with the defendant for 10 years and had previously lived with him.

"In cases in which the defendant's identity is not in issue, or those in which the protagonists are known to one another, 'suggestiveness is not a concern and hence, [CPL 710.30] does not come into play'" (People v Rodriguez, 79 NY2d 445, 449 (1992) citing People v Gissendanner, 48 NY2d 543, 552 (1979)). In this case, since the identifying witness of the single photo is the former girlfriend of the defendant, and they are well known to each other, the identification was confirmatory. Therefore, no Wade or Rodriguez hearing is required with respect to this identification (People v Tas, 51 NY2d 915 (1978); People v Rodriguez, supra).

5. MOTION FOR SANDOVAL/VENTIMIGLIA/MOLINEUX HEARING

Granted, solely to the extent that Sandoval/Ventimiglia/Molineux hearings, as the case may be, shall be held immediately prior to trial, as follows:

A. Pursuant to CPL §245.20, the People must notify the Defendant, not less than fifteen days prior to the first scheduled date for trial, of all specific instances of Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant, or as substantive proof of any material issue in the case,

designating, as the case may be for each act or acts, the intended use (impeachment or substantive proof) for which the act or acts will be offered; and

B. Defendant, at the ordered hearing, must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (see People v Malphurs, 111 AD2d 266 [2nd Dept. 1985]).

6. MOTION FOR DISCLOSURE OF BRADY MATERIAL

Defendant's motion for discovery of Brady material is granted, upon consent.

7. MOTION FOR SEVERANCE OF COUNTS

The defendant moves to sever counts 1 through 8 from each other for trial, contending that it is prejudicial to him to be tried on all counts together, due to the cumulative negative effect of multiple charges from different dates being tried together. He contends the charges are based on unrelated incidents and that there is substantially more evidence on some charges than others.

Under CPL 200.20, offenses based on different criminal transactions are joinable when they are "defined by the same or similar statutory provisions and consequently are the same or similar in law" (CPL 200.20 2) (c)). All of the counts of the indictment charge the defendant with criminal contempt (either first or second degree). Each of these charges of criminal contempt are clearly joinable with each other as the "same or similar in law" pursuant to CPL 200.20 (2)(c) (see People v Smith, 64 AD3d 619, 620 (2d Dept 2009); People v Richardson, 235 AD2d 502, 503 (2d Dept 1997)).

Moreover, evidence of each of the counts of criminal contempt in the first and second degrees would be admissible upon the trial of the other to demonstrate the

nature of the parties' relationship, absence of mistake, and to show the intentional violation of the order of protection (see People v Dorm, 12 NY3d 16, 19 (2009); People v Reyes, 144 AD3d 1683 (4th Dept 2016); People v Harvey, 5 Misc2d 751 (Crim. Ct, NY Co. 2004); see also People v McCloud, 121 AD3d 1286, 1289 (3d Dept 2014); People v Lee, 275 AD2d 995 (4th Dept 2000)). Lastly, the defendant has not identified any particular or important factual testimony he would be seeking to give as to any of the counts that would prejudice him as to the remaining counts. The defendant's motion to sever Counts 1 through 8 for trial is therefore denied.

8. MOTION FOR AN AUDIBILITY HEARING

The defendant moves for a hearing on the audibility of recorded tapes of phone calls alleged to have been made by the defendant from the Westchester County Jail. He argues the audio recordings have been corrupted and are inaudible, and should be deemed inadmissible on that basis. He seeks a hearing to determine the admissibility based on audibility of the tapes.

Whether a tape recording should be admitted into evidence is within the discretion of the trial court (People v Morgan, 175 AD2d 930 (2d Dept 1991)). In order to constitute competent proof, a tape should at least be sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript (People v Mincey, 64 AD2d 615 (1978)). The motion for an audibility hearing with respect to the recorded calls from the Westchester County Jail is granted, upon consent.

9. MOTION FOR A RESERVATION OF RIGHTS TO FILE FURTHER PRE-TRIAL MOTIONS

The defendant requests leave to make further motions as necessary. The defendant's motion is denied. CPL 255.20 is controlling with respect to the time frame for making pre-trial motions and there have been no allegations of good cause for making further motions outside of those time constraints. Any such request will be considered at the time it is made.

This constitutes the Decision and Order of this Court.

Dated: October 1, 2020
White Plains, New York

HON. SUSAN M. CAPECI
A.J.S.C.

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