People v Wells

2020 NY Slip Op 34912(U)

September 24, 2020

County Court, Westchester County

Docket Number: Indictment No. 19-1239

Judge: George E. Fufidio

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DELANE WELLS,

Defendant.

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FILED
OCT 05 2020
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER
Indictment No.: 19-1239

FUFIDIO, J.

Defendant, DELANE WELLS, having been indicted on or about January 15, 2020 on one count of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]); one count of criminal possession of a weapon in the third degree (Penal Law § 265.02[1]) and one count of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) 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 this Court disposes of this motion as follows:

A & G. MOTION FOR DISCOVERY, DISCLOSURE AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People. If any items set forth in CPL Article 245 have not already been provided to Defendant pursuant to that Article, said items are to be provided forthwith.

Next, the Defendant is apparently asking for a declaration from the Court that the time between the filing of the charges, at least until the date of his motion, which is dated May 15, 2020 be counted against the People for purposes of CPL 30.30. On February 20, 2020 a hearing was held on the People's request for a protective order on certain discovery and discovery was provided to the Defendant. On February 25, 2020 the People filed a certificate of compliance, which indicates a readiness declaration as of February 21, 2020 and another certificate of compliance was filed on March 3, 2020 once the People learned additional information that needed to be disclosed. The March 3, 2020 certificate of compliance confirms the People's readiness. Upon the filing of the original certificate of compliance, the Court made inquiry as to the People's readiness and the defendant, whose presence was waived, was given the opportunity through counsel, on the record, to inquire, "whether the disclosure requirement have been met" (CPL 30.30[5]). The Defendant's contention is that the People's original certificate of compliance was defective and thus any readiness was illusory. He is now seemingly seeking a declaration from the court that a certain amount of time be credited against the People. Notwithstanding the Governor of New York's Executive Order 202, issued on March 7, 2020 suspending CPL 30.30, the Court will not decide an issue not before it. The Defendant may move for a dismissal pursuant to CPL 30.30 where he can raise any issue of illusory readiness he may have and have the issue fully litigated, however, he has not done so here.

Nevertheless, a proper certificate of compliance is one that is issued in good faith after a diligent search and reasonable inquiries are made for material and information that is subject to discovery (CPL 30.30[5], 245.50[1], *People v Lustig*, ___ Misc3d ___; 2020 NY Slip Op 20096 [Sup. Ct. Queens County 2020])).[1] Additionally, as stated above the Defendant was provided an opportunity on the record to be heard on whether the disclosure requirements were met. In addition the Defendant has at his disposal the ability to seek sanctions based CPL 245.80 for discovery non-compliance, of which, invalidation of a certificate of compliance might perhaps be an, "appropriate remedy or sanction," however, the Defendant has not made a showing that he is entitled to such relief. Moreover, to the extent that the Defendant is asking for a declaration that the People are non-compliant for purposes of a CPL 30.30 speedy trial motion to dismiss, the Court declines the Defendant's invitation to do so. He, again, has the ability to file a specific motion for such relief, however he has not set forth any showing that this *omnibus* motion should also be considered as a motion to dismiss under CPL 30.30.

Any party is granted leave, if required, to apply for a Protective Order in compliance with CPL Article 245, upon notice to the opposing party and any party affected by said Protective Order. The People are directed to file a Certificate of Compliance with CPL Article 245 and the instant Order upon completion of their obligations thereunder, if they have not already done so. Any cross-motion for reciprocal discovery is likewise granted to the extent provided for in Criminal Procedure Law Article 245, and/or already provided to the People.

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.

B. MOTION FOR BILL OF PARTICULARS

The Defendant's motion is denied. The People have already given the Defendant a bill of particulars and that coupled with the voluminous discovery that they has received, including, "all transcripts of the testimony of a person who has testified before a grand jury…" (CPL 245.20[b]) is sufficient for the defendant to hold the People to proving the crime as it was presented to the grand jury and further for the Defendant to adequately prepare or conduct his defense (CPL 200.95[5]).

C & D. MOTION TO INSPECT AND 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

[1] In addition, the law requires the People to continually disclose information they might not have come across in their initial diligent search or by the initial reasonable inquiries and necessarily contemplates that material and evidence will be disclosed after the initial certificates of compliance and readiness are filed (*People v Nelson*, 67 Misc3d 313 [County Court, Franklin County 2020]). Any subsequent disclosure does not necessarily render previous declarations of readiness invalid (*People v Percell*, 67 Misc3d 190 [Crim. Ct., City of New York 2020]).

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). A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged (see CPL §210.30[2]).

The Defendant has raised the issue that the certificate of conviction for criminal possession of a weapon in the fourth degree that was admitted in evidence before the the grand jury to elevate the instant criminal possession of a weapon charge to the third degree impaired the integrity of the grand jury proceeding to the extent that the indictment must now be dismissed. In particular, he complains that the original charge, criminal possession of a weapon in the second degree appeared on the certificate, was not redacted and that the grand jury improperly considered that information when rendering their indictment; ostensibly, that they considered it as propensity evidence. The People's reasoning in support of using this particular conviction with this particular set of facts is somewhat specious because the Defendant has several convictions that the People could have used that do not implicate weapons possession crimes and that stray nowhere near raising a potential issue of an introduction of improper propensity evidence.

However, in the minutes the Court reviewed the People did not rely on or even mention the original charge and presented the certificate of conviction of a previous crime without commentary and for the express purpose of showing that the Defendant has previously been convicted of a crime. Importantly, the grand jury was instructed that any prior convictions are being introduced *solely* as an element of the charge to be considered and may specifically not be used as an indication of the Defendant's propensity to commit the present crimes (*People v Baez*, 118 AD2d 863 [2nd Dept. 1986]). The Grand Jury is presumed to have followed their instructions and the Defendant has not shown, nor has the Court seen any reason why this presumption should not be followed (*People v Walton*, 70 AD3d 871 [2nd Dept. 2010]). The People are walking a thin line, though, with this gambit that the Court has seen them use in the past. Had the Grand Jury questioned any aspect of the prior conviction itself or in conjunction with any aspect of the evidence presented, or if the evidence had not been as strong against the defendant as it was in this case, the result of this inquiry could very likely have resulted in a dismissal of charges. Yet, as it stands in this case, the Defendant's motion to dismiss is 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]). 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.

E. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

The Court orders a hearing on whether the noticed identification was 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 (*People v Riley*, 70 NY2d 523 [1987]).

F. 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:

I. 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

II. 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]).

H. MOTION TO STRIKE PREJUDICIAL LANGUAGE

The defendant moves to strike certain language from the indictment on the grounds that it is surplusage, irrelevant or prejudicial. The language concluding the indictment merely identifies the defendant's acts as public, rather than private wrongs and such language should not be stricken as prejudicial. This motion is denied (*see, People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]; *People v Garcia*, 170 Misc. 2d 543 [Westchester Co. Ct. 1996]).

I. MOTION TO SUPPRESS STATEMENTS

The Court grants the Defendant's motion 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]).

J. MOTION TO SUPPRESS PHYSICAL EVIDENCE

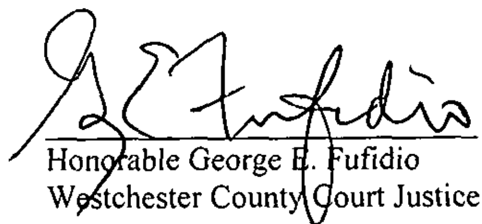
The Court grants the Defendant's motion solely to the extent that *Mapp* and *Dunaway* hearings are directed to be held prior to trial to determine the propriety of any search resulting in the seizure of property (*see*, *Mapp v Ohio*, 367 US 643 [1961]) and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see*, *Dunaway v New York*, 442 US 200 [1979]) and whether there was probable cause to arrest the defendant.

K. 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.

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

Dated: White Plains, New York
September 24 , 2020



Honorable George E. Fufidio
Westchester County Court Justice

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