

People v McCallop

2020 NY Slip Op 34915(U)

September 8, 2020

County Court, Westchester County

Docket Number: Indictment No. 19-1263-01

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

AKIM McCALLOP,

Defendant.

-----X
FUFIDIO, J.

DECISION & ORDER
Indictment No.: 19-1263-01

FILED

SEP - 8 2020

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, AKIM McCALLOP, having been indicted on or about September 6, 2019, for aiding, abetting and acting in concert with co-defendant Kashawn Glover with two counts of robbery in in the first degree (Penal Law § 160.15 [3] & [4]), two counts of burglary in the first degree (Penal Law § 140.30 [3] & [4]); one count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and one count of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and independently with criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession a weapon in the third degree (Penal Law § 265.02 [1]), criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]) and unlawful possession of marihuana (Penal Law § 221.05) 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 & C. 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 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]). Accordingly, Defendant's motion to dismiss or reduce for lack of sufficient evidence 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 Court did find one instance of a potential mis-instruction wherein the People instructed the Grand Jury on Penal Law 265.02[1] that, "under our law, a firearm needs to be loaded under Penal Law Section 265.02, subdivision 1 and it must be operable." That is an incorrect instruction, however, it is more restrictive than what is actually required, which is that the gun simply be operable (*People v Saunders*, 85 NY2d 339 [1995], *People v Zakrzewski*, 7 AD3d 823 [3rd Dept. 2004]). The Court finds no infirmity with the Grand Jury finding more than they were required to. Other than that, the Grand Jury was properly instructed (see *People v Calbud*, 49 NY2d 389 [1980] and *People v Valles*, 62 NY2d 36 [1984]).

Finally, the Defendant's motion to dismiss the indictment for facial insufficiency under CPL 200.50(7)(a) is also denied. The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). It is clear that the indictment charges each and every element of the crimes and further meets the requirement that the defendant be given notice of the charges against him with respect to the time, place and manner in which the People allege the crimes were committed (*People v Albanese*, 45 AD3d 691 [2d Dept 2007], *People v Iannone*, 45 NY2d 589 [1978]).

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.

B. 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. 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. The People's 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.

D. MOTION FOR SEVERANCE

The Defendant's motion to sever is denied. When charges against co-defendants are properly joined in a single indictment, motions for separate trials are addressed to the discretion of the trial court (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]). Where, as here, the proof against both 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]), and, ". . . a strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses. . . ." In this case, the defendant was properly joined in the same indictment (CPL 200.40[1]). The evidence underpinning the indictment, which is pertinent to proving the allegations in which both defendants are charged with aiding, abetting and acting in concert is common to both of the co-defendants.¹ Nevertheless, the Court may, for good cause shown, order that defendant be tried separately. Good cause includes a showing that defendant would be "unduly prejudiced by a joint trial" (CPL 200.40[1]). The Defendant claims that he and his co-defendant have antagonistic defenses but has not shown how the two are in irreconcilable conflict with one another, nor how this conflict would lead a jury to infer guilt upon him (*People v Mahboubian*, 74 NY2d 174 [1989]). Mere inconsistency in defenses is not enough to warrant a severance (*People v Allaway*, 172 AD2d 617 [2nd Dept. 1991]). The Defendant has not made a showing that a joint trial would be unduly prejudicial to him.

E. 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]).

F. MOTION TO SUPPRESS PHYSICAL EVIDENCE

¹ Akim McCallup is charged in this indictment with several other crimes that occurred after the incident in which this Co-Defendant is implicated.

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.

G. MOTION TO STRIKE 710.30 NOTICES

The Court denies the Defendant's motion to strike the CPL 710.30 statement and identification notices. They are in conformity with the requirements of CPL 710.30 in so far as they give notice of the time, place and manner in which they were given and for statements, the substance of the statements sought to be used, in order for the Defendant to challenge them (*People v Rodney*, 85 NY2d 289 [1995]; *People v Lopez*, 84 NY2d 425 [1994]; CPL 710.30). Moreover, a motion made to suppress such statements and identifications, such as were made here, effectively waives any claim of deficiency in the notices (*Lopez, supra*).

H. MOTION TO STRIKE IDENTIFICATION NOTICES OR ALTERNATIVELY SUPPRESS IDENTIFICATIONS

As in POINT F above the Defendant's motion to strike is denied. The notices are in conformity with CPL 710.30 and the Defendant has moved to suppress the identifications noticed thus effectively waiving his right to challenge any deficiency (*People v Lopez*, 84 NY2d 425 [1994], *People v Kirkland*, 89 NY2d 903 [1996]).

With respect to the suppression motion, the Court decides as follows:

1. Single Photo Identification: The People argue that this was a picture that one of the victims showed the police that was taken from a social media account. This factual scenario is described in greater detail in the victim's grand jury testimony. This was not a police arranged identification procedure and thus there is nothing to be suppressed (*People v Marte*, 12 NY3d 583 [2009]).
2. The remaining photographic array identifications: A hearing shall be held to consider whether the noticed identifications were unduly suggestive (*United States v Wade*, 388 US 218 [1967]). In the event that 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 victim's proposed in-court identification (*People v Adelman*, 36 AD3d 926 [2nd Dept. 2007]).

I. MOTION FOR BILL OF PARTICULARS

The Defendant's motion for bill of particulars is denied as moot. The People have provided one to the Defendant along with their response.

J. MOTION TO STRIKE ALIBI NOTICE

The Defendant's motion to strike the alibi notice is denied. Contrary to the Defendant's contentions, it is well-settled that CPL 250.00 is indeed in compliance with the constitutional requirements (*see People v Dawson*, 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People v Gill*, 164 AD2d 867 [2d Dept 1990]) and provides equality in the required disclosure (*People v Peterson*, 96 AD2d 871 [2d Dept 1983]; *see generally Wardius v Oregon*, 412 US 470 [1973]).

K. 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]).

L. MOTION FOR HEARING TWO WEEKS PRIOR TO TRIAL

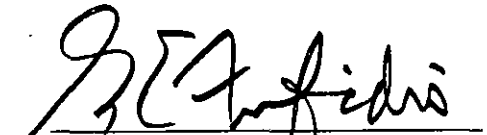
This motion is denied. The hearings will be conducted immediately prior to trial. The defendant has shown no reason nor offered any authority why hearings should be held two weeks prior to trial.

M. 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 8, 2020



Honorable George E. Fufidio
Westchester County Court Justice