

People v Perez
2020 NY Slip Op 34917(U)
January 15, 2020
County Court, Westchester County
Docket Number: Ind No. 19-1120-01
Judge: Anne E. Minihan
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

TONY PEREZ,

Defendant.

-----X
MINIHAN, J.

Defendant, by Westchester County Indictment No. 19-1120-01 is charged with Attempted Robbery in the First Degree (Penal Law § § 110/160.15[3]), Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[1]), and Menacing in the Second Degree (Penal Law § 120.14[1])¹.

Defendant has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and a Memorandum of Law. In response thereto, 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 November 26, 2019, the Court disposes of this motion as follows:

I.

MOTION to STRIKE IDENTIFICATION NOTICE
& TO PRECLUDE IDENTIFICATION TESTIMONY
CPL 710

The People served CPL 710.30(1)(b) notice of an identification made of defendant on October 23, 2019, at approximately 1:15 p.m. in the vicinity of 2 Palisade Avenue, Yonkers, NY. Defendant moves to strike the identification notice and to suppress the identification as the product of an impermissibly suggestive police procedure.

The motion to strike is denied. Said notice is in conformity with the statutory requirements of CPL 710.30.

Defendant's motion to suppress identification testimony is granted to the limited extent of ordering a pre-trial *Wade* hearing (*see United States v Wade*, 388 US 218 [1967]). At the hearing, the People bear the initial burden of establishing the reasonableness of the police

¹By special information attached to the indictment, defendant is charged with having been previously convicted of Attempted Criminal Obstruction of Breathing (Penal Law 110/121.11) on May 3, 2017, in Yonkers City Court, County of Westchester, State of NY.

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ON 1-15 2020
WESTCHESTER

DECISION & ORDER
Ind No.: 19-1120-01

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TIMOTHY C. IDONI
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COUNTY OF WESTCHESTER

conduct and the lack of any undue suggestiveness (*see People v Chipp*, 75 NY2d 327, 335 [1990] *cert. denied* 498 US 833 [1990]; *People v Berrios*, 28 NY2d 361 [1971]). Once that burden is met, the defendant bears the ultimate burden of proving that the procedure was unduly suggestive. Where suggestiveness is shown, the People must show the existence of an independent source by clear and convincing evidence.

To the extent that defendant's motion seeks to strike unnoticed identification testimony, that branch of the motion is denied as premature. The People are aware of their obligations under CPL 710.30.

II.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION CPL Article 245

To whatever extent material that is discoverable under Criminal Procedure Law Article 245 has not already been provided to the defense by the People, the defendant's motion is granted and such discovery, including both *Brady* material² and *Rosario* material, shall be provided forthwith. Leave is granted for either party to seek a protective order (CPL Article 245). If the defense has a particularized reason to believe that there remains outstanding discovery with which he has not been provided, he is directed to contact the assigned Assistant District Attorney upon receipt of this order. If the issue remains unresolved within two days of receipt of this order, counsel for the defendant shall contact the court to request an immediate compliance conference.

If the People have fulfilled their discovery obligations but have not yet filed a Certificate of Compliance, they are directed to do so forthwith and they are reminded of their continuing obligation to remain in compliance with the discovery mandates set forth in CPL Article 245 and to file supplemental Certificates of Compliance as the need arises.

To the extent the People cross-move for reciprocal discovery, it is likewise granted to the extent provided for in CPL Article 245. Further, the Bill of Particulars set forth in the voluntary disclosure form provided to defendant has adequately informed defendant of the substance of the alleged conduct and in all respects complies with CPL Article 245 and Section 200.95.

The People recognize their continuing duty to disclose the terms of any deal or agreement made between the People and any prosecution witness at the earliest possible date (*see People v*

² The People acknowledge their continuing duty to disclose exculpatory material (*Brady v Maryland*, 373 US 83 [1963]; *see Giglio v United States*, 405 US 150 [1971]). If the People are or become aware of any such material which is arguably subject to disclosure under *Brady* and its progeny and Criminal Procedure Law Article 245 which they are unwilling to consent to disclose, they are directed to bring it to the immediate attention of the court and to submit it for the court's in camera inspection and determination as to whether it constitutes *Brady* material discoverable by the defendant.

Steadman, 82 NY2d 1 [1993]; *Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Wooley*, 200 AD2d 644 [2d Dept 1994]).

To the extent that defendant requests disclosure of the identity of any informants, the People are reminded of their obligations under CPL 245.20(c) with respect to the disclosure of informants, if any.

III.

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 notify the defendant, *in compliance with CPL Article 245*, of all specific instances of his 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 he elects to testify at trial, *and in any event not less than 15 days prior to the first scheduled trial date*.

At the hearing, the defendant shall 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 his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

Upon the consent of the People, in the event that the People determine that they will seek to introduce evidence at trial of any prior uncharged misconduct and criminal acts of the defendant, including acts sought to be used in their case in chief, they shall so notify the court and defense counsel, *in compliance with CPL Article 245, and in any event not less than 15 days prior to the first scheduled trial date*, and a *Ventimiglia/Molineux* hearing (*see People v Ventimiglia*, 52 NY2d 350 [1981]; *People v Molineux*, 168 NY 264 [1901]) shall be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be used by the People, including to prove their case in chief. The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia/Molineux* hearing to be consolidated and held with the other hearings ordered herein.

IV.

MOTION to STRIKE PREJUDICIAL LANGUAGE

The Defendant moves to strike certain language from the indictment on the grounds that it is irrelevant and potentially 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. Thus, this branch of the motion is denied (*see People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]).

V.

MOTION to INSPECT, DISMISS and/or REDUCE
CPL ARTICLE 190

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.

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). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*see People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

Pursuant to CPL 190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. A review of the Grand Jury minutes reveals that 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]).

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 reveal that 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 Collier*, 72 NY2d 298 [1988]; *People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

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.

VI.

MOTION to STRIKE ALIBI NOTICE

Defendant's motion to strike the People's demand for a bill of particulars and alibi notice as unconstitutional is denied. Contrary to the defendant's contentions, it is well-settled that CPL 250.20 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]).

VII.

MOTION to STRIKE STATEMENT NOTICES
& to PRECLUDE STATEMENT TESTIMONY
CPL 710

The People noticed pursuant to CPL 710.30(1)(a) statements allegedly given by defendant to Yonkers police on October 23, 2019, at approximately 1:15 p.m. and the same day at approximately 3:30 p.m. Defendant moves to strike the notice and to suppress the statement as involuntary, the product of an unlawful arrest, and procured during interrogation without proper *Miranda* warnings.

The motion to strike is denied. Said notice is in conformity with the statutory requirements of CPL 710.30.

The motion is granted, on consent of the People, to the extent that a *Huntley* hearing shall be held prior to trial to determine whether the statement was involuntarily made by 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]). The hearing shall also address whether the statement was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

VIII.

MOTION to SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress all physical evidence obtained pursuant to his arrest as the product of unlawful police conduct. Alternatively, defendant moves for a *Mapp/Dunaway* hearing. The People oppose the motion arguing that the police lawfully seized physical evidence from defendant. Defendant's motion is granted solely to the extent of ordering a pre-trial *Mapp* hearing to determine the propriety of any search resulting in the seizure of property from defendant (*see Mapp v Ohio*, 367 US 643 [1961]). The hearing will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

IX.

MOTION to CONDUCT PRE-TRIAL HEARINGS
TWENTY DAYS in ADVANCE of TRIAL

The defendant's motion to schedule pre-trial hearings twenty days prior to trial is denied. The hearings will be scheduled at a time that is convenient to the Court, upon due consideration of all of its other cases and obligations.

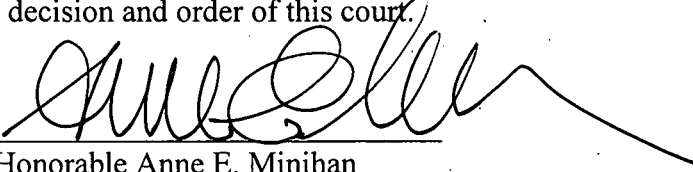
X.

MOTION for TIME to FILE FUTURE MOTIONS

To the extent that the motion seeks leave to make further motions, that branch of the motion is denied. Any future motion must be brought by way of order to show cause setting forth reasons as to why said motion was not brought in conformity with CPL 255.20.

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

Dated: White Plains, New York
January 5, 2020


Honorable Anne E. Minihan
Acting Supreme Court Justice

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