

People v Nunez

2020 NY Slip Op 35462(U)

September 24, 2020

County Court, Westchester County

Docket Number: Indictment No. 19-1091

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-

DECISION & ORDER
Indictment No.: 19-1091

JESUS NUNEZ,

Defendant.

-----X
FUFIDIO, J.

Defendant, JESUS NUNEZ, having been indicted on or about December 4, 2019, on one count of assault in the second degree (Penal Law § 120.05 [3]), reckless endangerment in the first degree (Penal Law § 120.25); one count of obstructing governmental administration in the second degree (Penal Law § 195.05); unlawful fleeing a police officer in a motor vehicle in the third degree (Penal Law § 270.25); reckless driving (Vehicle and Traffic Law § 1212); failure to comply with police officer directive (Vehicle and Traffic Law § 1102); moving a stopped vehicle in an unsafe manner (Vehicle and Traffic Law § 1162); failure to stop before entering an intersection and failure to remain stopped until given proper indication to proceed (Vehicle and Traffic Law § 1111 [d][1]); failure to turn vehicle safely (Vehicle and Traffic Law § 1163[a]); failure to indicate an intention to turn (Vehicle and Traffic Law § 1163[d]); operating a vehicle at a speed in excess of the maximum speed limit posted (Vehicle and Traffic Law § 1180 [d]); failure to remain within a single lane, and failure to ascertain that movement between lanes could be done safely (Vehicle and Traffic Law § 1128[a]) and failure to comply with no passing signs, or road markings (Vehicle and Traffic Law § 1126[a]) 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:

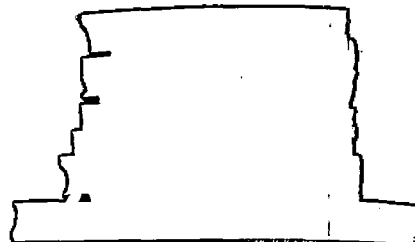
A. MOTION TO PRECLUDE STATEMENTS AND IDENTIFICATIONS NOT NOTICED

The Defendant's motion to preclude statements allegedly made by him and identifications made of him is denied as premature. The People have not given notice of any statements or identifications under CPL 710.30. Should they try to use any statements or identifications of the type that would ordinarily require CPL 710.30 notices, the People will need to comply with the late notice provisions of CPL 710.30 and should the Court accept late notice, the Defendant may then move for suppression of those identifications and statements identified in those notices.

FILED

March 5 2021

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER



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.

As noted in the People's response, the Defendant complains that he has not received the so called "1k" material for all of the involved police officers. To the extent that the People are still using what they have termed the "1K Questionnaire" they are hereby ordered to turn over the answers and the questions asked of the officers involved in this case. If any police officers have refused to answer any question in that questionnaire, as had been the case earlier in 2020 (*see, Matter of the Application Certain Police Officers to Quash a So-ordered Subpoena Duces Tecum, et al.*, , 67 Misc3d 458 [County Court, Westchester Co. 2020]) the People are to report that to the Defendant and the Court so that the appropriate steps may be taken in order to get that information. If the answers were that there was no information to report then the People have fulfilled their obligation. If any of the answers were in the affirmative, then the People, if they get the information pertinent to the affirmative answers, are required to turn that information over to the Defendant. Should the People, for some reason, decide not to obtain that information or despite the answers being in the negative the Defendant still wants to view the police personnel files, then, by the repeal of Civil Rights Law section 50-a, he is free to obtain that information on his own, by whatever method he deems most appropriate.

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.

C. 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]).

D. 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]).

E & G. 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 Boamong*, 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 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.

Finally, the portion of the defendant's motion requesting dismissal of 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). In reading the language of the indictment on its own and in conjunction with the bill of particulars given to the defendant in consent discovery, 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]).

F. MOTION TO DISMISS PURSUANT TO CPL 190.50

The Defendant's motion to dismiss pursuant to CPL 190.50 is denied as untimely. Such a motion must be made within five days of arraignment (CPL 190.50 [5][c]). The Defendant was arraigned on April 2, 2020 and the first time the Defendant has moved for this relief is in the instant motion dated August 3, 2020.

H. MOTION TO STRIKE ALIBI NOTICE

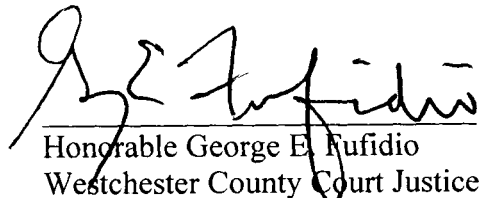
The Defendant's motion to strike the alibi notice is denied. Contrary to the Defendant's contentions, it is well-settled that CPL 250.00 is indeed in compliance with the constitutional requirements (*see People v Dawson*, 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People 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]).

I. 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. Ruffido
Westchester County Court Justice

To:

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