People v White
2021 NY Slip Op 31984(U)
July 2, 2021
Supreme Court, Bronx County
Docket Number: 949/2020
Judge: Ralph Fabrizio

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, PART 11
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THE PEOPLE OF THE STATE OF NEW YORK

Decision and Order
Indictment No. 949/2020

-against-

TERRENCE WHITE,

Defendant
----------x

Johnnise Lopez, Assistant District Attorney, Bronx County District Attorney's Office

Nicholas Schumann-Ortega, The Legal Aid Society, Bronx, New York, for Defendant.

FABRIZIO, J.

The narrow issue addressed is whether the People's failure to provide the defendant with two video recordings of statements he made to the police forty-eight hours prior to the time he was scheduled to appear before the grand jury mandates that the indictment be dismissed pursuant to CPL § 190.50. This Court answers that question in the negative. In addition, the Court finds that the remedy of dismissal of this indictment, which is statutorily authorized in a late discovery situation, is too drastic and denies the same application in an exercise of its discretion.

The relevant timeline and facts are not in any dispute. Defendant was arraigned on a felony complaint in Criminal Court, Bronx County, on November 15, 2020. The complaint charges him with Criminal Possession of a Weapon in the Second Degree. The judge at the arraignment set monetary bail. The People notified defendant that the case would be presented to a grand jury on November 19, 2020, which was the "180.80

day." Defendant served notice that he intended to testify before the grand jury, and the People notified counsel defendant would be produced for that purpose at 10:00 a.m. on the 180.80 day. The People did not serve any notice pursuant to CPL § 710.30(1)(a) of any statements they knew of that defendant had made to anyone in law enforcement subsequent to the arrest at the time of the arraignment. The Court credits the assigned ADA that she was told that defendant had not made any statements at that time.

On the morning of November 19, 2020, the ADA was notified by a detective that defendant had in fact made two post-arrest statements and they had been preserved as digital video recordings. At 9:25 a.m., via email, the People notified defense counsel about the existence of the recorded statements, and said the detective was on his way to the Bronx District Attorney's Office with the recordings. At 10:08 a.m., the People provided counsel with the actual videos via Microsoft One Drive. The People simultaneously informed counsel of the "sum and substance" of the recorded statements as follows: "I was going to KFC and the police approached and I panicked and just left. I just got a ride. I was coming from home in Harlem." At 9:47 a.m., defense counsel responded, "Ok, thanks for letting me know."

The People provided additional emails sent to defense counsel on prior days. On Monday, November 16, 2020, at 3:59 p.m., the assigned ADA notified defense counsel that she would be presenting the case to the "B" panel, which would end its work on November 27, 2020. The ADA also wrote, "If your client wishes to testify before the grand jury, he must do so on Thursday, November 19, 2020 at 10:00 am. If I do not hear from you by the above time and date, I will proceed to vote the case accordingly." On November 18, 2020, at 2:16 p.m., the assigned ADA wrote a second email to

defense counsel, which asked, “Will your client testify tomorrow or are you withdrawing 190.50 notice?” That same day, at 2:33 p.m., counsel responded, “I haven’t spoken with [defendant] yet. I will speak with him tomorrow in person.” [1]

After the People provided counsel with the video statements, counsel spoke with his client, in person, when defendant was produced in the courthouse on November 19, 2020. At 11:57 a.m. that day, counsel informed the People, via email, that he was withdrawing the 190.50 notice, and that defendant would not testify before the grand jury. Later that day, before the 180.80 period expired, the grand jury voted to indict defendant.

Defendant argues that a 190.50 violation is now automatically established when the People fail to provide notice of any statements of any kind that a defendant made at least 48 hours prior to the time a defendant is scheduled to testify before the grand jury. The statute implicated, CPL § 275.10(1)(c), was enacted into law as part of a 2019 budget bill. Under the prior discovery statutes, the People had no obligation to provide defense counsel with even the sum and substance of any statements made by their client before the client testified in the grand jury. Now, the People must not only provide discovery of any statements including those they do not plan to introduce at trial as they had to do under prior law, but they must make that disclosure before the expiration of a bright-line time period. Although there is no specific reliable legislative history for why this deadline was selected, and no court has pegged 48 hours as a bright line deadline when the People provide a defendant with reasonable notice of when to appear offer

[1] Counsel did not arraign defendant and was not the lawyer who served notice that defendant intended to testify.

testimony. See People v. Sawyer, 96 N.Y.2d 815 (2001) (a day or a day and a half reasonable under the circumstances of that case), the statute has been violated.

Of course, this new discovery requirement and deadline is aimed at providing defense counsel with notice of what the client said to the police before the attorney makes a decision about whether the client will testify before the grand jury and lock themselves into sworn testimony that may be materially inconsistent with any prior statements. Such disclosure would allow for conversation between lawyer and client that would avoid damaging potential impeachment. The practice in Bronx County, prior to this new legislation, was for the District Attorney to serve sum and substance 710.30 statement notice on every case at the time of the criminal court arraignment. Thus, this statute did nothing to change what prosecutors in the Bronx have done for years. Another apparent venue-specific practice is counsel serving 190.50 notice at the time of arraignment that the client will testify in nearly every case. That is the reason behind the "will your client really testify" and "I'll let you know after we speak" email chain, which, in this Court's experience, is typical in all cases. Thus, in this case, the local practice informs in part whether the late statement notice is a dispositive factor behind the withdrawal of the 190.50 notice, and merits a 190.50 dismissal ruling.

Statement evidence, in terms of discovery deadlines, is no different from any other type of discovery. Statutory discovery deadlines were part of the prior statutes, just as they are in the current discovery statutes. The type of remedy that a court can impose for a discovery violation is linked to the type of discovery and the circumstances of the disclosure. The most serious mandatory penalty, and perhaps the only mandatory penalty, for failing to comply with new discovery deadlines is dismissal based on the

finding that the People's Certificate of Compliance with all discovery deadlines, is invalid or untimely, and the resulting chargeable time under CPL§ 30.30(5). This was not something that was possible under the prior statute. See People v. Caussade, 162 A.D.2d 4, 8 (2nd Dept. 1990). In terms of dismissing an indictment based on an allegation of a "defective" grand jury proceeding, as is relevant here, the law still requires a finding that "[t]he defendant [was] not afforded an opportunity to appear and testify before the grand jury in accordance with the requirements of section 190.50." CPL § 210.35(4). Significantly, the legislature did not amend 190.50 as part of the criminal justice reform legislation, as they did with Article 30.30. Thus, the DA is not required to provide notice of any statements as a statutory 190.50 requirement connected with presenting the case to a grand jury. And that is why this Court denies that remedy as a matter of law.

What we have here is a 275.10 violation by reason of late disclosure of discovery. Remedies for late disclosure of discovery are contained in CPL§ 245.80. The statute clearly provides that a court need not impose a punitive remedy in every late discovery situation. When discovery is late, there is only a "need for remedy or sanction" where "the party entitled to disclosure shows that it was prejudiced." CPL § 245.80(1). The only remedy that does not require a showing of prejudice is for the court to give "reasonable time to prepare and respond to the new material" to the party receiving late disclosure. Id. The remedy of dismissal of an indictment in a situation where late disclosure is implicated is an "available [discovery] sanction" only where there is a "need for such remedy," which first requires a demonstration of prejudice. CPL §§ 245.80(1) and (2). This is also a discretionary remedy.

Given the record here, no punitive 245.80 remedy is available for a very simple reason: there is no allegation of prejudice. Defendant does not claim in his motion papers that he was prejudiced by reason of this late disclosure. He does not claim that his client did not testify because of the late notice. He does not claim that his client wants to testify before a new grand jury. Indeed, when this Court asked the parties to argue the motion, defendant stated on the record that he has not suffered any prejudice whatsoever because of the late disclosure of these statements. Counsel never went to the grand jury judge to ask that he be given additional time to review this late disclosure, a request he was entitled to make under CPL § 245.80(1) without any accompanying allegation of prejudice. Instead, counsel sought this remedy after the indictment was filed and defendant was arraigned basically for the purpose of making the People present the case to a second grand jury. To this Court, dismissal of this indictment is not a reasonable, discretionary penalty on this record.

The disclosure of the statements only half an hour before the time given for the defendant to testify is, of course, of concern given that this is discovery deemed to be in the People's custody by statute. CPL § 245.20(2). As it turned out, counsel notified the People 90 minutes after the scheduled time that his client would not testify at all, and the People did not ask the grand jury to vote until after that time. That extra hour seems to have been sufficient for counsel to review the statements and to speak with his client before counsel decided that defendant would not testify, but that cannot be a reason for the People to believe they will be entitled to this type of ruling in another case. Nonetheless, even though defendant did not allege prejudice by reason of this belated disclosure, this Court has reviewed the video recordings at issue. The Court

understands that it does not stand in the shoes of defense counsel in determining whether there was prejudice in terms of making a decision about whether it made sense to have defendant testify. However, the Court understands why counsel has not claimed the late disclosure of these particular statements was prejudicial.

Both video clips capture what is happening in the precinct interrogation room at different times. One video clip, which lasts about 20 minutes, contains a statement by the defendant in only the broadest terms. Defendant spends almost all this time alone in that room. When defendant speaks, he complains that he is in pain. He is repeatedly reassured that someone has called for an ambulance. There is no questioning, and there are no other statements. The video ends when the EMTs arrive. The other clip lasts about 15 minutes. It begins, like the other video, with interrogation room being COVID sanitized before defendant is brought it. A detective informs defendant what he wants to question him about, and then reads the Miranda warnings. Statements made by the defendant take up about a minute of the recording. The sum and substance notice provided in the People's email captures almost all of what defendant said. There is a bit more conversation about why, if he lives in Manhattan, did he come to the Bronx to go to KFC. But the rest of the interrogation is the detective speaking about the type of evidence that might be forthcoming from the gun defendant is alleged to have possessed, such as fingerprints and DNA. Defendant responds to none of this. There is no admission or denial by defendant that he possessed the gun. The paucity of statement evidence only amplifies the reason for this Court's denying the motion to dismiss this indictment.

To the extent that People v. Francis, Ind. No. 1891-2020 (Crim. Ct. Kings County 2020), cited by defendant, a decision where the court dismissed an indictment for late disclosure of statements, represents a discretionary ruling, this Court does not question that judge's ruling. To the extent that it stands for the proposition the dismissal of that indictment was ordered as a matter of law for a 190.50 violation based solely on late disclosure of the defendant's statement (in that case 39 hours before the scheduled time), this Court respectfully disagrees.

This constitutes the Decision and Order of this Court.

So ordered.

Dated: July 2, 2021

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Hon. Ralph Fabrizio