

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 31

_____X

THE PEOPLE OF THE STATE OF NEW YORK, :

-against-

Indictment No. 2004/2014

SAID SALIM, :

Defendant. :

_____X

**MEMORANDUM OF LAW IN SUPPORT OF
SAID SALIM'S PRETRIAL MOTIONS**

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Said Salim's ("Detective Salim") pretrial motions to dismiss Counts 1 and 2 of the indictment as duplicitous and Count 5 as legally insufficient, pursuant to C.P.L. §§ 200.30(1), 200.50(3), 210.20(1)(a), 210.20(1)(b) and 210.35(5).

INTRODUCTION

Detective Salim is charged under Counts 1 and 2 of the indictment with perjury which emanated from his testimony before a grand jury on July 17, 2009, and a suppression hearing on September 8, 2010, about the events preceding the arrests of Wayne Davis and Jose Martinez for possession of more than two kilograms of cocaine.

Although the indictment includes only two counts of perjury (one for each proceeding), each count has improperly combined several unique and unspecified allegedly false statements. Despite a timely defense request for bills of particular seeking specification of which testimony serves as the basis for these counts, the People declined to respond.

Count 5 (Official Misconduct) charges that Detective Salim's alleged illegal detention of Wayne Davis deprived him of the "benefit" of his right to be free from unlawful search and seizures.

STATEMENT OF FACTS

On July 13, 2009, Detective Salim and several colleagues from the firearm investigation unit conducted an operation which included the use of a confidential informant to purchase illegal firearms. During the operation, the team lost sight of the informant, who was dressed in all white, including a fisherman style hat. While searching for the informant, Detective Salim and his partner Detective Timothy Garcia saw, approached and ultimately arrested Wayne Davis and Jose Martinez for the possession of more than two kilograms of cocaine. Davis was dressed in all white,

including a fisherman style hat. Detective Salim’s testimony in regard to the circumstances which preceded these arrests are the subject of this indictment.

Counts 1 and 2 broadly allege that upon seeing Davis and Martinez, Detective Salim intentionally lied about “what he and his partner had done when they got out of their car” (Count 1) and that he intentionally misled the court “about the circumstances that led to his arresting Davis and Martinez” (Count 2). In support of the first count, the indictment includes approximately 12 cherry-picked questions and answers¹ about different topics of purportedly false testimony which “demonstrate” Detective Salim’s perjury. In support of the second count, the indictment includes approximately 48 questions and answers about assorted topics which purportedly “demonstrate” his perjury.

Based upon a review of the selected snippets listed in the indictment and a copy of the criminal complaint filed against Davis and Martinez, which forms the basis for Counts 3 and 4 (Exhibit C), the People presented to the grand jury as many as eight unique topics about which Detective Salim lied, yet sought and secured an indictment for single counts of perjury in each of the first two counts of the indictment under a “catch all” theory that Detective Salim simply lied about the events preceding the arrests in the two proceedings. These unique topics of purportedly false testimony include:

¹ Detective Salim’s testimony about the similarities in appearance between the informant and Davis are omitted from the indictment’s “examples” of his false testimony. *See*, Grand Jury Testimony of Said Salim, July 13, 2009 (Exhibit A), p. 6. The similarity in appearance between the informant and Davis is a substantial issue because it corroborated Detective Salim’s allegedly false testimony and would have served as a complete defense to perjury charges in connection with Detective Salim’s basis for approaching Davis and Martinez. The People were aware that several of Detective Salim’s colleagues corroborated him and contradicted the confidential informant, whom we believe has denied that he was dressed in white. Shortly before Detective Salim was indicted, we requested that the People present to the grand jury exculpatory evidence from witnesses who corroborated Detective Salim. *See*, Letter from Mark Bederow to Ryan Connors, dated April 14, 2014 (Exhibit B).

- That Detective Salim first approached Davis and Martinez because he believed Davis to be a lost confidential informant. *See*, Indictment, pp. 2-3, 5-6, 8-9.
- That he lied about when he realized Davis was not the informant. *Id.*
- That he observed Davis hand Martinez a duffle bag later found to possess more than two kilograms of cocaine. *See*, Exhibit C; Indictment, pp. 2, 5.
- That he observed Davis drop the bag. *Id.*
- That he told Davis and Martinez to pick up the bag and leave. *See*, Indictment, pp. 2, 5-9.
- That Davis and Martinez both denied custody over the bag. *See*, Exhibit C; Indictment, pp. 3, 5, 7-9.
- That he searched the bag before he “stopped and searched” Davis. (Count 1)
- That he searched the bag before he “stopped and arrested”² Davis. (Count 2). *See*, Indictment, pp. 6-7, 9-10.

The grand jury transcript reveals that Detective Salim was never questioned about his physical interactions with Davis before he was arrested. In fact, as part of the People’s practice of “bare bones” grand jury presentations, which are designed in part to avoid specific references to search and seizure issues before the grand jury, the prosecutor interrupted Detective Salim’s narrative of events in order to specifically elicit the resemblance between Davis and the informant. *See*, Exhibit C, pp. 7-8.

² The People’s distinction in language between Counts 1 and 2 (“search” vs. “arrest”) is not a small one. The former requires proof that Detective Salim intentionally lied in the grand jury about frisking Davis before searching the bag full of cocaine, while the latter requires proof that he lied before a suppression court that he stopped and/or searched Davis, *and* that he took Davis into custody and detained him without probable cause prior to searching the bag. By their own pleading language in Count 2, which alleges two distinct actions, each with a differing evidentiary standard, the People have demonstrated the duplicitous nature of the indictment.

At the suppression hearing, Detective Salim initially testified that he did not frisk Davis prior to arresting him for the narcotics.³ Upon further questioning, however, Detective Salim qualified this statement, demonstrated a degree of uncertainty, and allowed for the possibility that he did frisk Davis before recovering the narcotics. *See*, Indictment, p. 9 (“from what he recalled,” he patted Davis down after he opened the bag); p. 10 (a pat down occurred after the arrest, “from what he recalled); (“he didn’t recall” patting Davis down upon exiting his vehicle, *cf.* after he recovered the cocaine he “definitely 100% patted him down at the scene, yes”). In doing so, Detective Salim’s testimony created a muddled record with some inconsistent statements. It was the obligation of the prosecutor and defense counsel to clean up the record. However, the record was left in this unclear manner. Neither the prosecutor nor defense attorney sought to clarify the apparent inconsistencies in Detective Salim’s testimony.⁴

Prior to the suppression hearing, defense counsel for either Davis or Martinez received a poor quality video which allegedly captured the encounter. The grainy video purportedly shows⁵ Detectives Salim and Garcia approach Davis and Martinez, frisk them, move away from them, recover a bag and then arrest them. This video, which serves as the People’s purported “smoking gun” proof of Detective Salim’s intentionally false testimony, was never used to refresh his

³ On or about June 21, 2010, ADA Ritch sent Detective Salim a copy of his grand jury testimony for him to review prior to testifying in the suppression hearing. As noted above, Detective Salim was not questioned in the grand jury about pre-arrest frisks of Davis, and he did not testify about any pre-arrest physical contact with Davis.

⁴ It’s understandable why defense counsel would opt to leave a muddled record in a suppression hearing, but seeking a perjury indictment on such a messy record is another matter altogether. The Court of Appeals has noted that before reaching a determination on whether testimony was knowingly false, as opposed to the result of faulty memory, “some slight effort to stimulate the witness’ recollection should be made.” *See*, *People v. Tyler*, 46 N.Y.2d 251, 260-261 (1978).

⁵ The People provided counsel with several opportunities to view the recording at the DA’s Office, but have not provided us with a copy of the recording to view on our own. To this day, Detective Salim has never viewed the recording, has never been questioned about its contents in connection with his testimony, and has never even reviewed the suppression hearing testimony which underlies Count 2.

recollection, to seek clarification of unclear testimony or to confront him with his apparently inconsistent testimony. Instead, defense counsel decided to show the video to the prosecutor in an effort to persuade her that Detective Salim lied. It worked.

Shortly after she was made aware of the video, ADA Sarah Ritch confronted Detective Salim about her disbelief in his testimony. Detective Salim stated that he was unaware of the video, but acknowledged that “I may have been mistaken about the timing of when I patted them down.” VDF, p. 2. Two days later, Detective Salim indicated to ADA Ritch that he wished to see the video before speaking with prosecutors any further. VDF, p. 2. She refused.

Shortly after September 8, 2010, ADA Ritch referred the matter to her Bureau Chief, which as part of a case reassessment led to the People’s “investigation” of Detective Salim’s testimony. During a phone conversation with another detective in which she requested an interview of the confidential informant and detective, ADA Ritch said that although she was unaware if other bureaus “had interest” in Detective Salim, there was no investigation “pertaining to you,” [the other detective] but the matter would have “ramifications down the line which she didn’t know about” which were “over her head.” When the detective expressed concern about the nature of the conversation, and indicated that he wished to consult counsel, ADA Ritch replied that “it didn’t make a whole lot of sense” for the detectives to “lawyer up.”

On January 11, 2011, the People dismissed all charges against Davis and Martinez.

The People expressed disbelief in Detective Salim’s testimony on September 8, 2010. He was placed on modified duty on February 28, 2012. Yet Detective Salim was not formally charged until April 30, 2014, or almost four years later and more than two years after he had been placed in career limbo by the NYPD.

On May 1, 2014, the defense promptly filed and served a bill of particulars, seeking, among other things, specification of what testimony constituted the alleged perjury in Counts 1 and 2. Request for Bill of Particulars, May 1, 2014 (Exhibit D). The People declined to respond within the 15 day period prescribed by C.P.L. § 200.95(4).

ARGUMENT

Point 1: Counts 1 and 2 of the Indictment Must be Dismissed as Duplicitous.

An indictment must provide fair notice of the charges against a defendant. *People v. Keindl*, 68 N.Y.2d 410. A defendant may not be charged with more than one offense in a single count of an indictment. *Id.* at 417. Acts which make out distinct crimes must be charged in separate distinct counts or the indictment is duplicitous and thus defective. *Id.*

Beyond providing the defense fair notice of what he must defend against, the prohibition against duplicity also protects an accused from double jeopardy and allows a defendant to raise that defense in the event of a subsequent prosecution. *Id.* at 416. It also ensures the reliability of a unanimous verdict—if more than one crime are alleged in a single count there is the risk that a defendant could be convicted even though a jury did not agree on any one specified offense. *Id.* at 418.

In the context of a perjury charge, more than one specification of perjury in the same proceeding may support a single count if they relate to the same matter or act. *See, People v. Ribowsky*, 77 N.Y.2d 284 (1991). Whether the subject matter is so similar to warrant inclusion in one count or different such that separate counts are required was addressed in *Matter of Di Lorenzo v. Murtagh*, 36 N.Y.2d 306 (1975). There, the Court distinguished between discrete subjects (requiring separate counts) and a series of questions related to a single, integral inquiry. *See id.* at 311-312.

Murtagh, involved one meeting, but the unique issues involved in the single encounter supported separate counts of perjury. *See id.* at 310-311 (separate counts required for questions on “sole purpose” of meeting, and for questions on what was discussed at meeting). The present case also involved one encounter, but Detective Salim was questioned (and according to the People lied about) several unique topics in connection with the encounter with Davis and Martinez. As noted above, these included in part why he approached Davis in the first instance, whether he saw the bag handed from person to person, whether it was dropped to the ground, when he searched Davis and when he detained Davis.

Ribowsky does not lead to a different conclusion. There, the Court was presented with far different circumstances which allowed multiple specifications of perjury to be supported in a single count. For example, in *Ribowsky*, the alleged specifications all related to one unique topic: the use of a home address for improper purposes. *See, Ribowsky*, 77 N.Y.2d at 289. Additionally, *Ribowsky* involved three specifications after a bill of particulars was filed; here the People have specified nothing beyond the generic allegation that Detective Salim lied about the events of July 13, 2009.

In support of the charges, the People listed approximately 12 (Count 1) and 48 (Count 2) possible examples of perjury about entirely different subject under the generic labels “circumstances leading to an arrest,” and “what they did when they got out of their car.” *See*, Indictment pp. 2, 4. The People have refused to particularize further. *See also, People v. Santmyer*, 255 A.D.2d 871. 872 (4th Dept. 1998) (in upholding indictment from duplicity argument, court noted that indictment specified one single statement of the defendant).

The indictment here presents the problems addressed in *Keindl*. Without knowing the evidence before the grand jury and how the People instructed the grand jury on their theory of

which statements of Detective Salim's were false, the list of questions and the answers in the indictment suggests that the People merely alleged that "Detective Salim lied" and left it to the grand jury to determine what those lies were.

For example, a single count of perjury would be defective if some grand jurors believed that Detective Salim lied about the reason he approached Davis, yet others believed him on that point, but then concluded that he lied about the transfer of the bag, and still others believed the false testimony related solely to whether he frisked Davis before he recovered the cocaine. Unless the People particularized and specified which testimony was false, these counts are duplicitous and defective.

Accordingly, Counts 1 and 2 of the indictment must be dismissed as duplicitous. In the alternative, the defense requests the release of the entire grand jury transcript, including the legal instructions, and leave to present a sur-reply response in order to present a more informed argument about the People's improper merger of several perjury allegations into single counts.

Point II: The Official Misconduct Charge Must Be Dismissed Because the Right to Remain Free from Unreasonable Search and Seizures is not a "Benefit."

Count 5 of the indictment alleges that Detective Salim intentionally and unlawfully stopped and frisked Wayne Davis, which deprived him of the "benefit" of his right to remain at liberty. A "benefit" is defined as "any *gain or advantage* to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary (emphasis added). Penal Law §10.00(17); *see also, New York Courts CJI-Criminal Jury Instructions, Official Misconduct, P.L. §195.00* (for offenses committed on or after November 1, 1990). A "gain" is "an advantage" or "an increase in amount, size or number;" "an increase in amount, magnitude or degree." *Merriam-Webster Online Dictionary*. An "advantage" is defined as "superiority of

position or condition.” *Id.* “It is clear from the legislative history and from the statutory definition of “benefit” that the official misconduct statute was designed to include gain...” *People v. Feerick*, 93 N.Y.2d 433, 446 (1999).

Even where the People’s theory alleges that a defendant deprived a person of a benefit, the statute requires that the defendant intend to obtain a benefit for himself. *People v. Esposito*, 144 Misc.2d 919, 921 (N.Y. Cty. Sup. Ct. 1989). The “benefit” must not be remote, abstract or theoretical. *People v. Jackson*, 35 Misc.3d 179, 186 (Kings Cty. Crim. Ct. 2011).

Thus, under the common sense interpretation of Penal Law §§10.00(17) and 195.00, the People must establish that Detective Salim, with a personal nexus to violating Davis’ rights, deprived Davis of a tangible “gain or advantage” by preventing him from the opportunity of increasing his already-existent liberty at the time he was allegedly improperly searched and seized. A person who is at liberty and is then unlawfully detained by police is not deprived of a “gain or advantage;” he is deprived of what he already had—his freedom and his civil rights. It defies common sense that maintaining one’s present condition of freedom is a “gain or advantage.” Davis arguably was deprived of his civil rights, he not been deprived of an advantage or increase from his pre-existent liberty, which he already enjoyed before his rights were allegedly violated.

Indeed, one court has expressly held that “one’s civil rights cannot be construed as a ‘gain or advantage’ under P.L. §10.00(17). *People v. Sandino*, 34 Misc.3d 1223(A) (Kings Cty. Crim. Ct. 2011) (deprivation of civil rights is “merely tangential” to the officer and therefore does not satisfy the requirement of a “benefit” to sustain an official misconduct charge).

We are unaware of any recorded case in which the theory put forth by the People here—that a violation of a person’s constitutional rights, without more, constitutes a deprivation of a

benefit—which has resulted in sustainable Official Misconduct charges.⁶ *See, Sandino*, 34 Misc.3d at 1223(A); *see also, Feerick*, 93 N.Y.2d 433 (despite flagrant violations of Fourth Amendment by police officers, “benefit” analysis focused solely on officers’ direct and personal interest in regaining a police radio rather than the deprivation of the victims’ constitutional rights); *People v. Lemma*, 39 Misc.3d 399 (Nassau Cty. Dist. Ct. 2013) (dismissal of Official Misconduct charge where People alleged that an incarcerated person was deprived of his right to have liberty restored based upon officer’s failure to inform prosecutor individual was incarcerated at time he was accused of a robbery).⁷

Acceptance of the People’s convoluted interpretation of a “benefit” would criminalize, as a state offense, every intentional constitutional violation by police officers. Such a reading is contradictory to the legislative intent behind the official misconduct statute. If the legislature had intended to flood the criminal courts with criminal civil rights violations cases, it would have created a law which tracks 18 U.S.C. §242 and criminalizes deprivation of civil rights—not benefits. However, in replacing the former P.L. §854, Oppression Committed Under Color of Official Right,⁸ with the Official Misconduct statute in 1965, the legislature carefully added the word “benefit” and the requirement that a “gain or advantage” constitute an element of a crime

⁶ The appropriate forum to address an alleged deliberate violation of an individual’s constitutional rights is in a federal district court under 18 U.S.C. §242. Rather than address “benefits,” the federal statute criminalizes a deliberate “deprivation of any rights, privileges or immunities.”

⁷ Although *Lemma*’s dismissal focused on the intent element rather than benefit, the individual in *Lemma* was incarcerated and thus an intentional deprivation of his liberty arguably could have deprived him of the “benefit” of being free, whereas here, Davis was already free and thus his right to remain free cannot constitute a “gain or advantage.”

⁸ The former statute, which is similar to 18 U.S.C. §242, specifically criminalized the “malicious” unlawful search and seizure of a person without the requirement of gaining a personal benefit or depriving another of a benefit. *See, Feerick*, 93 N.Y.2d 433, footnote 2.

alleging intentional misconduct by a public servant. Therefore, it is clear that the legislature did not intend for the official misconduct statute to be used as a general civil rights violation statute. However, this is precisely the manner in which the People have utilized it here. Accordingly, Count 5 of the indictment must be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant Detective Salim's motions and dismiss Counts 1, 2, and 5 of the indictment.

Dated: May 29, 2014
New York, New York

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