

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM PART TAP A QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NY 11415

P R E S E N T :

HONORABLE JOSEPH ANTHONY GROSSO
ACTING JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK Ind. No. 909/02

- against -

Motion To Preclude and
Dismiss

D'ANDRE BROWN,

Defendant.

Submitted

On the papers submitted

James Shalley, Esq.
For the Motion

Hon. Richard A. Brown
District Attorney, Queens
County, by:

Denise Tirino, Esq.
Opposed

The defendant, charged inter alia, with Rape in the First Degree, moves for an order precluding the introduction of DNA evidence and dismissing the indictment.

The salient facts are not in dispute. On CPL 180.80 day, the District Attorney sought and obtained a search warrant to take saliva samples from the defendant. This application was made ex parte at a time when the defendant was represented by counsel, who apparently was in the courtroom at the time the application was made.

The main issue is whether preclusion of the saliva samples

and the DNA results derived therefrom should be granted and the indictment dismissed due to a "right to counsel" violation.

For the reasons stated below, I am precluding the People from introducing any evidence obtained as a result of the search warrant. I am not, however, dismissing the indictment.

The transitional period while a case is pending on a felony complaint and before an indictment is filed is a "legal black hole" in the criminal procedure law. There are few actions a local criminal court can take at this period in the life of a case. Clearly, as the People correctly contend, there can be no court ordered discovery for any party under CPL article 240 where the only accusatory instrument pending is a felony complaint. Two options exist in order to obtain non-testimonial evidence.

1) Pursuant to the Matter of Abe A, 56 NY2d 288, the People may proceed by a noticed order to show cause; or

2) The People may seek to proceed by way of a search warrant, which is, by its definition, an ex parte application.

In my opinion, either of these options is legally permissible.

The few cases in this area, (See, In the Matter of Santucci, 117 Misc.2d 500; People v. Coleman, 43 NY2d 222; and People v. Smith, 134 AD2d 465), suggest that where an accusatory instrument has been filed and a defendant is represented by counsel that the People should proceed by way of a show cause order, and be held to the standards of Abe A, supra. I find these cases persuasive and, in this case, choose to follow them. However, nothing in this decision should be construed as an absolute bar to the People from utilizing a search warrant to obtain such non-testimonial evidence under appropriate circumstances. The need for an ex parte order should be contained in the affidavit in support of the warrant in the same fashion and manner as a "night time provision" or "no knock" provision. Also, while I am suppressing the use of the DNA evidence obtained in this case I am not precluding the People from seeking the same evidence through another appropriate motion or procedure.

The People contend that the evidence obtained pursuant to the search warrant should not be precluded under the inevitable discovery. I hold the inevitable discovery doctrine inapplicable

to "primary evidence". See, People v. Stith, 69 NY2d 313.

_____The fact that precluded evidence exists does not effect the validity of the indictment. The evidence before the Grand Jury was prima facie competent. Therefore, the motion to dismiss the indictment is denied.

Accordingly, the motion to preclude the use of this DNA evidence is granted, while the motion to dismiss the indictment is denied.

So ordered.

JOSEPH ANTHONY GROSSO

Date: September 20, 2002