SHORT FORM ORDER INDICTMENT NO. 01159A-2006

County Court of the County of Suffolk
Part 7 - State of New York

PRESENT:
Hon. JAMES HUDSON

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

LAMAR WHITEHEAD,

Defendant.

ORIG. RETURN DATE: 09/28/06
FINAL SUBMIT DATE: 10/06/06

PLTF'S/PET'S ATTY:
HON. THOMAS J. SPOTA
Suffolk County District Attorney
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Riverhead, New York 11901

DEFT'S/RESP'S ATTY:
SHARIFOV & RUSSELL LLP
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Upon the following papers numbered 1 to 9 read on this motion for omnibus relief Notice of Motion and supporting papers 1-6; Affirmation/affidavit in opposition and supporting papers 7-8; Affirmation/affidavit in reply and supporting papers 9; Other ; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

Before the Court is an omnibus motion by the defendant requesting several forms of relief. The People consented in part and opposed in part. After careful consideration it is hereby:

ORDERED that defendant's application to dismiss the indictment for sufficiency is denied. The Court reviewed the Grand Jury minutes and finds that the evidence presented to the Grand Jury was legally sufficient to sustain the indictment and the Grand Jury was properly instructed on the law, and it is further

ORDERED that the defendant's application to have the Grand Jury instruction minutes released to them for inspection is denied, and it is further

ORDERED that the People are directed to correct their ministerial error and amend count four of the indictment to reflect the correct date of the alleged crime, and it is further

ORDERED that defendant's motion for further discovery is denied as moot, and it is further

ORDERED that the defendant's application for a hearing to determine the admissibility of his oral/written statements at trial is granted, and it is further

ORDERED that the defendant's application to suppress the out-of-court voice identification of the defendant is granted to the extent that the Court will hold a hearing to determine whether voice identification of the defendant by a potential witness required CPL 710.30 notice, and it is further

ORDERED that the defendant's application for a hearing to determine whether there was sufficient probable cause for his arrest is denied, and it is further

ORDERED that the defendant's application to suppress the physical evidence in this case because they were obtained without probable cause is denied, and it is further

ORDERED that a hearing shall be held prior to trial to determine whether any of defendant's prior criminal convictions or bad acts may be admissible if he testifies at trial, and it is further

ORDERED that the People are directed to continue to provide the defendant with exculpatory material as they become aware of its existence, and it is further

ORDERED that the defendant's motion for disclosure of *Rosario* material pursuant to CPL 240.45 is granted.

The defendant moved to dismiss the indictment on the grounds that the evidence before the Grand Jury was insufficient to establish the offenses charged (CPL § 210.20[1][b]), and that the Grand Jury proceedings were legally defective (CPL § 210.20[1][c] and 210.35[5]). The People did not oppose an *in camera* inspection of the Grand Jury minutes.

The Court reviewed the Grand Jury minutes and finds that the evidence presented to the Grand Jury was legally sufficient to sustain the indictment and that the Grand Jury was properly instructed on the law (*People v. Mayo*, 36 N.Y.2d 1002, 374 N.Y.S.2d 609 [1975]).

The defendant also moved to have the Grand Jury instruction minutes released to them so that they may supplement their motion to dismiss or reduce the indictment. This application is denied. Under Criminal Procedural Law Section 190.25(4), Grand Jury proceedings are secret. In order to overcome this secrecy the moving party must demonstrate, by factual presentation, why and to what extent he requires the minutes of the Grand Jury (*In the Matter of the District Attorney of Suffolk County*, 86 A.D.2d 294, 449 N.Y.S.2d 1004 [2nd Dept., 1982]; *Ruggiero v. Fahey*, 103 A.D.2d 65, 478 N.Y.S.2d 337 [2nd Dept., 1984]); and the reason for the disclosure must be to such an extent that the public interest in disclosure must outweigh the interest of secrecy (*People v. Di Napoli*, 27 N.Y.2d 229, 316 N.Y.S.2d 622 [1970]). The defendant has failed to demonstrate a need sufficient to overcome the presumption of confidentiality.

As for the defendant's application to dismiss count four of the indictment because no crime was alleged to have been committed on October 14, 2005, this application is denied as was explained by the People in their answer that the October 14, 2005 date was a ministerial error and that the crime actually occurred on or about October 14, 2004. The People are directed to amend the indictment to reflect the correct date.

The defendant also moved to preclude all tape and electronic recordings from trial because when the defendant requested the discovery of such items the People erroneously responded that such evidence did not exist. Since the filing of the People's response the parties met on September 27, 2006, and engaged in open discovery. At this time the defendant had access to all the property seized from the defendant including the listening of audio tapes. The People also offered to make a copy of the audio recording if defense counsel provided a blank cassette tape. The only item that was not available to defense counsel at this meeting was a laptop computer that was kept in Yaphank. The defense was told that they could inspect the computer at any time at the Yaphank facility.

Preclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction. "The overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society" (*People v. Kelly*, 62 N.Y.2d 516, 478 N.Y.S.2d 834 [1984]; *People v. Jenkins*, 98 N.Y.2d 280, 746 N.Y.S.2d 651 [2002]). The People appear to have corrected any errors they may have made in their discovery response, and it does not appear that the defendant has suffered any prejudice from the late disclosure. Therefore, it appears that the People have fully complied with the defendant's request. Accordingly, the defendant's application is denied as moot.

The defendant also moved to preclude a voice identification by a potential prosecution witness because the People failed to disclose the identification in their CPL 710.30 notice (*People v. Collins*, 60 N.Y.2d 214, 469 N.Y.S.2d 65 [1983]). The People argued that the witness was an acquaintance of the defendant, therefore, no notice was required because the identification was only "confirmatory" (see *People v. Tas*, 51 N.Y.2d 915, 434 N.Y.S.2d 978 [1980]). While the People are correct that a confirmatory identification is not required in a CPL 710.30 notice, the Court cannot ascertain the level of familiarity this witness had with the defendant from the papers submitted. In fact, neither in the defendant's nor the People's papers even indicate the identity of the witness, nor how the identification procedure was performed. The People merely responded that the witness and the perpetrator "were known to each other as they were acquaintances for a number of years." The People did not describe the nature of their relationship and did not give the basis for their belief that this witness could identify the defendant's voice. The People's response was essentially a boilerplate answer that could have been made in any identity confirmation argument. Therefore, the Court will hold a hearing prior to trial to determine whether the out-of-Court identification of the defendant was an identification that required CPL 710.30 notice (see, *People v. Rodriguez*, 79 N.Y.2d 445, 583 N.Y.S.2d 814 [1992]; *People v. Van Wallendael*, 259 A.D.2d 716, 688 N.Y.S.2d 166 [2nd Dept., 1999]).

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Defendant further motioned for a *Mapp/Dunaway* hearing (*Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684 [1961]; *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 [1979]) to determine whether there was sufficient probable cause for the defendant's arrest and seizure of evidence. The defendant did not submit an affidavit containing sworn allegations of fact (CPL 710.60). Instead, the defense attorney submitted an affirmation based on an inspection of the record, conversations with the assistant district attorney and defense counsel's own investigation. The affirmation only alleged legal conclusions and conclusory allegations. The Court of Appeals stated in *People v. Mendoza* (82 N.Y.2d 415, 604 N.Y.S.2d 922 [1993]), that hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, the Court is required to review the factual sufficiency of the motion with reference to the pleadings, the context of the motion and defendant's access to information. Here, the defendant's bare legal conclusion and conclusory allegations are fatal to the motion (*People v. Mendoza*, *Id.*). To accept defendant's allegations (in their present form) would be in derogation of the aforementioned statute. Such an action on the Court's part would be legislative in nature and a patent violation of the venerable (yet still viable) maxim *expressio unius est exclusio alterius*. Therefore, the defendant's application for a probable cause hearing and a hearing to suppress the physical evidence in this case is denied.

The People consented to the defendant's request for a *Huntley* hearing. Therefore, a *Huntley* hearing shall be conducted immediately prior to trial to determine the admissibility of defendant's oral and/or written statements pursuant to *People v. Huntley* (15 N.Y.2d 72, 255 N.Y.S.2d 838 [1965] citing *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 [1964]).

The People also consented the defendant's request for a *Sandoval* hearing (*People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 [1974]) to determine whether the defendant has any prior criminal convictions or bad acts that may be admissible if the defendant testifies at trial. Therefore, a *Sandoval* hearing shall be held prior to trial.

The defendant's request for the disclosure and release of any exculpatory materials pursuant to *Brady v. Maryland* (373 U.S. 83, 83 S.Ct. 1194 [1963]) is granted to the extent that the People have acknowledged their duty to provide the defendant with exculpatory materials, if such exist, in a timely manner. Similarly, the People have also acknowledged their duty to disclose *Rosario* material (*People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 [1961]) at the appropriate time pursuant to CPL 240.45.

This constitutes the decision and order of the Court.

Dated: Riverhead, New York
October 30, 2006

JAMES HUDSON
J.C.C.