

People v Montefusco
2006 NY Slip Op 30157(U)
January 10, 2006
Suffolk County Ct
Docket Number: 0002542/2004
Judge: James C. Hudson
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT:

Hon. JAMES HUDSON

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

DATED: January 10, 2006
INDICTMENT NO.: 02542-2004

-against-

RAYMOND MONTEFUSCO,

Defendant(s).

HON. THOMAS J. SPOTA
Suffolk County District Attorney
PETER TIMMONS, ESQ., Asst. District Attorney
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901

REYNOLDS, CARONIA, GIANELLI & HAGNEY
By: PAUL GIANELLI, ESQ.
Attorney for Defendant
200 Motor Parkway
P.O. Box 11777
Hauppauge, New York 11788-0945

The case at bar is a prosecution for burglary in the third degree, criminal facilitation in the fourth degree and various acts of official corruption (i.e. Official Misconduct, Receiving Reward for Official Misconduct 2nd Degree) which attended the alleged commission of certain burglaries in this county.

Pursuant to the 7/13/05, 8/31/05 and 9/8/05 decisions of the court (Kahn J.) a combined Ventimiglia/Sandoval hearing was held on January 5th, 2006 to determine the propriety of the People's intentions to adduce evidence of uncharged crimes on their case in chief as well as the use of alleged prior bad acts to be used to confront the defendant should he take the stand.

In support of their argument, people cite to the holdings in People v. Vails, 43 N.Y.2d 364; People v. Molineux, 168 N.Y.264; People v. Gines, 36 N.Y.2d 932; People v. Tabora, 139 A.D.2d 540 (2nd Dept. 1988); People v. Ventimiglia, 52 N.Y.2d 350 (1981); People v. Beam, 57 N.Y.2d 241, People v. Negron, 280 A.D.2d 557; People v. Alvino, 71 N.Y.2d 233 (1987); People v. Ingram, 71 N.Y.2d 474 (1988); People v. Burton, 186 A.D.2d 672; People v. Pons, 159 A.D.2d 471 (2nd Dept.1990); People v. Ricks, 218 A.D.2d 820 (2nd Dept. 1995); People v. Boyd, 230 A.D.2d 805 *lv denied* 89 N.Y.2d 919; People v. Johnson, 155 A.D.2d 924 *app denied* 75 N.Y.2d 920; and People v. McDowell, 191 A.D.2d 515 *lv denied* 81 N.Y.2d 1016. To counter People's arguments, defense counsel rely on the decisions of People v. Grutz,

PEOPLE V. MONTEFUSCO
INDICTMENT NO. 02542-2004

212 N.Y. 72, *People v. Duffy*, 212 N.Y. 57, *People v. Fiore*, 34 N.Y.2d 81, in addition to many of the cases relied upon by the People. The Court wishes to commend both Mr. Gianelli and Mr. Timmons for their scholarship and advocacy for their respective clients.

The uncharged conduct of the defendant consists of the following alleged misdeeds. A burglary at a store known as Master Concepts on October 8th, 1999 and at a home on 6 Denise Drive at North Babylon, in the late summer or fall of '99. In both these instances the People contend that the defendant using his police radio, acted as the lookout for the other burglars. Although disputed by the defense, People contend that this is the *modus operandi* used by the defendant during the charged burglaries, and hence is admissible pursuant to *People v. Molineux*, and it's progeny. People also wish to introduce evidence that the defendant was present at the scene of a burglary at Schmidt's delicatessen at Suffolk Avenue, Brentwood, NY, on May 10th, 1999. Additionally, the People have sought leave to introduce evidence in the form of a conversation the defendant purportedly had with a Mr. Careccia (in the fall of 1999) in which the defendant suggested a plan to commit robberies of drug dealers. Finally, the People wish to elicit testimony from witnesses who will recount conversations of the defendant discussing his purchase and use of steroids. The People also wish to refer to a SCPD Internal Affairs file which details an incident in November of 1999 in which the defendant allegedly avoided a mandatory drug test.

On the question of *Sandoval*, the People request leave to utilize all of the aforementioned activities for cross-examination if the defendant chooses to take the stand. Additionally they would question the defendant about: the deposit of large amounts of cash into his bank account; the fraudulent use of a credit card at a local appliance store in 2000 and 2001; being the lookout for a Robbery at Strathmore Bagels on July 25th, 2000; participation in a burglary in June of 2000; committing disability fraud in January of 2003; and several incidents in his Internal Affairs files.

Initially, the Court will discuss the propriety of the People's *Molineux* application. "Although evidence of uncharged criminal conduct is inadmissible to demonstrate that the defendant had a propensity to commit the crime charged... such evidence is admissible where, as here, it tends to establish intent or the absence of mistake or accident" (*People v. Burton*, 186 A.D.2d 672, 673 [2nd Dept.1992], 588 N.Y.S.2d 616 citing *People v. Molineux, supra*).

In the case of *People v. Fiore*, 34 N.Y.2d 81, (1974), 356 N.Y.S.2d 38, the Court warned of the dangers of admitting uncharged crimes when Judge Breitel opined "...merely showing two or more similar crimes does not necessarily establish a common scheme. To some extent every criminal repeater has a *modus operandi*. But a *modus operandi* alone is not a common scheme; it is only a repetitive pattern." (*Id.* at 87). In the years since *Fiore*, the Courts have attempted to apply *Molineux* in light of *Fiore's* caveat.

In *People v. Huddy*, 73 N.Y.2d 40 (1988), 538 N.Y.S.2d 197, the trial court was entrusted with a two-part inquiry concerning *Molineux* evidence. "The first level of this inquiry requires the

PEOPLE V. MONTEFUSCO
INDICTMENT NO. 02542-2004

proponent of the evidence, as a threshold matter, to identify some issue, other than mere criminal propensity, to which the evidence is relevant...Once such a showing is made, the court must go on to weigh the evidence's probative worth against its potential for mischief to determine whether it should ultimately be placed before the fact finder. This weighing process is discretionary, but the threshold problem of identifying a specific issue, other than propensity, to which the evidence pertains poses a question of law [citations omitted]" (*Id.* at 54, abrogated on other grounds in *Carmell v. Texas*, 529 U.S. 513).

Applying this standard to the allegations before us, the Court finds that the People may introduce evidence of the defendant's alleged participation in the Master Concepts and 6 Denise Drive, North Babylon burglaries. The unique character of the defendant's supposed actions on those occasions clearly brings them within the ambit contemplated by *Molineux* (see *People v. Alvino*, *supra*). Likewise, evidence concerning the defendant's alleged use of steroids is admissible based on the holdings in *People v. Boyd*, *People v. Johnson* and *People v. McDowell*, *supra*. The holding in *People v. Dolan*, 172 A.D.2d 68 (3rd Dept. 1991), 576 N.Y.S.2d 901, is particularly analogous to the matter *sub judice* because it also involved an indictment arising from the misconduct of a police officer. "The court permitted the introduction of this evidence [drug use] to show defendant's intent and motive to commit and benefit from the crimes alleged in the indictment. Motive and intent are probative of defendant's guilt and evidence thereof is legally admissible for such purposes. The record shows that Supreme Court properly weighed the probative value of the People's offer of proof against its potential for prejudice, and we find no error in the exercise of its discretion in admitting the testimony" (*Id.* citing *Molineux*, *Ventimiglia*, and *Hudy*).

The other incidents referred to by the People namely the Schmidt's delicatessen incident, the conversation concerning robberies and the drug testing incident referred to in SCPD Internal Affairs file are not proper material for introduction on the People's case and would merely be used to demonstrate a general criminal propensity on the part of Mr. Montefusco (see, *People v. Alvino*).

Pursuant to the decision in *People v. Rojas*, 97 N.Y.2d 32, 735 N.Y.S.2d 470 (2001), our ruling is also made with the caveat that if the defense affirmative places the defendant's character into issue or otherwise opens the door with respect to this evidence, the previously (and subsequently) barred areas of inquiry may be subject to refutation by the People (see also CPL Sec. 6040[2]).

We now turn to the use of prior bad acts for cross-examination purposes under the rule in *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974). It is beyond cavil that a prior bad act on the part of a defendant in which he or she demonstrates a "... willingness to further his own interests at the expense of society" is a proper subject for cross-examination (*People v. Waltower*, 270 A.D.2d 435, 705 N.Y.S.2d 256 [2nd Dept. 2000]). This must of course be balanced against the possibility of the jury being prejudiced against the defendant (*Id.* citing *People v. Pally*, 131 A.D.2d 889, 517 N.Y.S.2d 244; *People v. Pavao*, 59 N.Y.2d 282, 292, 464 N.Y.S.2d 458).

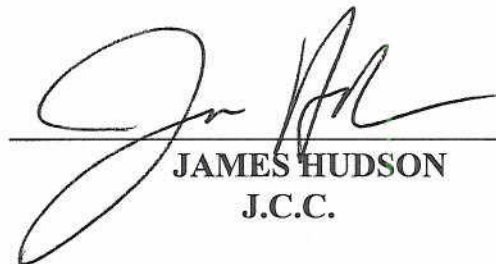
**PEOPLE V. MONTEFUSCO
INDICTMENT NO. 02542-2004**

In the light of applicable case law, we find that the alleged incident in 2000 and 2001 concerning the use of a credit card in a family members name satisfies this criteria. The People (sharply disputed by the defense) have described an act of deception (see People v. Rockwell, 18 A.D.3d 969, 794 N.Y.S.2d 726 (3rd Dept. 2005)). The allegations concerning the alleged robbery at Strathmore Bagel and the June 2000 burglary are too similar in nature, however, to be considered as anything other than general propensity evidence. Moreover, the lack of an underlying conviction for these prevents the use of a Sandoval compromise (e.g. People v. Rivera, 308 A.D.2d 602 [2nd Dept.2003] 764 N.Y.S.2d 880). Since the use of this information would only serve inflame the jury against the defendant, it's use will be barred (People v. Ortero, 75 A.D.2d 168, 428 N.Y.S.2d 965 [2nd Dept.1980] citing People v. Ashwal, 39 N.Y.2d 105, 109-110, 383 N.Y.S.2d 204; People v. Wright, 41 N.Y.2d 172, 391 N.Y.S.2d 101; People v. Reyes, 64 A.D.2d 657, 407 N.Y.S.2d 55.)

The matters alleged in the SCPD Internal Affairs file must be discussed separately. Contrary to the People's assertions, an *in camera* review revealed nothing which would be proper subject for a Sandoval inquiry. We must note that the only incident which resulted in a founded claim (e.g. the report of a lost pistol) was at the most, an act of negligence, not moral turpitude. Unless the defendant (either personally or through counsel) affirmatively discusses the incidents (In the IA report) referred to by the People in their Sandoval application the prosecution is precluded from utilizing this information.

Based on the forgoing, the defendant's Internal Affairs file will remain under seal.

This memorandum constitutes the decision and order of the Court.



JAMES HUDSON
J.C.C.