SHORT FORM ORDER

INDICTMENT NO. 02967-2005

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-

KENNETH MCKAY,

Defendant.

ORIG. RETURN DATE: 03/13/06
FINAL SUBMIT DATE: 04/04/06

PLTF'S/PET'S ATTY:
HON. THOMAS J. SPOTA
Suffolk County District Attorney
By: BRADFORD S. MAGILL, III, ESQ.
200 Center Drive
Riverhead, New York 11901

DEFT'S/RESP'S ATTY:
ROBERT C. MITCHELL, ESQ.
LEGAL AID SOCIETY OF SUFFOLK
By: MARK D. BERGER, ESQ.
300 Center Drive
Riverhead, New York 11901

Upon the following papers numbered 1 to 5 read on this motion for omnibus relief Notice of Motion and supporting papers 1-3; Affirmation/affidavit in opposition and supporting papers 4-5; Affirmation/affidavit in reply and supporting papers ____; 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 motion for discovery pursuant to 240.20 is denied as moot, and it is further

ORDERED that defendant's motion for a bill of particulars is denied as moot, and it is further

ORDERED that the People's cross-motion for reciprocal discover pursuant to CPL 240.30 is granted, and it is further

ORDERED that the defendant's motion for a *Sandoval* hearing is denied at this time, and it is further

ORDERED that the People shall notify the defendant of any prior uncharged criminal, vicious or immoral acts which they intend to use at trial for the purposes of impeaching the defendant's credibility, and it is further

ORDERED that the defendant's motion to preclude the identification testimony of Patrick Boker is granted to the extent that a *Rodriguez* hearing will be held prior to trial to determine whether the identification procedure used by the police in this case is one for which a suppression hearing is appropriate.

The defendant moved for omnibus relief and requested discovery pursuant to CPL 240.20. The People responded to the defendant's request in their answer and the defendant did not submit a reply contesting the sufficiency of the People's answer. Therefore, it seems that the People have fully complied with the defendant's request. Accordingly, the defendant's application is denied as moot.

Similarly, the defendant motioned for a Court order directing the People to furnish them with a bill of particulars. The People responded to the defendant's demand by supplying a bill of particulars in their answer. The defendant did not submit a reply contesting the sufficiency of the People's answer. Therefore, it seems that the People have fully complied with the defendant's request. Accordingly, the defendant's application is denied as moot.

The People's cross-motion for reciprocal discovery pursuant to CPL 240.30 is granted.

The defendant's application for a *Sandoval* hearing is denied at this time (*People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 [1974]). The defense has failed to inform the Court of any "prior uncharged criminal, vicious, or immoral conduct" that would warrant a *Sandoval* hearing (*People v. Matthews*, 68 N.Y.2d 118, 506 N.Y.S.2d 149 [1986]). The Court, however, orders the People to notify the defendant of any conduct that they intend to use at trial for the purpose of impeaching the credibility of the defendant (CPL 240.43). Should prior uncharged criminal, vicious, or immoral conduct be discovered, the court will re-entertain an application for a *Sandoval* hearing prior to the commencement of trial.

The defendant's motion for a *Ventimiglia* hearing is denied at this time. Should the People intend to introduce any prior conviction, uncharged crime or bad acts by the defendant in its case in chief, however, the People are ordered to notify the Court before trial so that a hearing may be held to determine its admissibility as delineated in *People v. Molineux* (168 N.Y. 264 [1901]) and *People v. Ventimiglia* (52 N.Y.2d 350 [1981]).

The defendant also motioned to preclude the identification testimony of the alleged victim, Patrick Boker, because the prosecution failed to give CPL 710.30 notice of their intention to offer the identification testimony within fifteen days of arraignment. The People responded that the defendant was

identified at the scene of the crime by a witness who had numerous previous encounters with the defendant, and that the identification was merely confirmatory and did not require CPL 710.30 notice.

It appears that the People have not fully addressed the defendant's motion. It is uncontroverted that there were two witnesses who identified the defendant. It appears that only one witness had previous encounters with the defendant. This witness' identification is not being challenged. It is asserted that the other witness, Patrick Boker, was not previously acquainted with the defendant. It is Mr. Boker's identification procedure that is being challenged.

As recently explained by the Court of Appeals in *People v. Boyer* (___ N.Y.3d ___, NY Slip Op 2290 [March 28, 2006]), there are two instances as a matter of law when a defendant is not entitled to a *Wade* hearing and thus, the People are not obligated to provide notice pursuant to CPL 710.30(1)(b). In the first instance, commonly known as the *Rodriguez* scenario, a court may summarily deny a *Wade* hearing (and hence no CPL 710.30 notice would be required) where the court concludes that, as a matter of law, the identifying, civilian witness knew the "defendant so well that no amount of police suggestiveness could possibly taint the identification" (*People v. Rodriguez*, 79 N.Y.2d 445 [1992]). The other scenario is known as the *Wharton* scenario. In *People v. Wharton* (74 N.Y.2d 921[(1989]) an experienced undercover officer observed the defendant face-to-face during a planned buy-and-bust operation. The officer then radioed his backup team with a description of the defendant, who was immediately arrested. As planned, within five minutes of the arrest, the purchasing officer drove past the defendant specifically for the purpose of identifying him, and then again identified him a few hours later at the police station. The quality of the officer's initial viewing of a defendant is critical in a *Wharton* type analysis. The risk of suggestiveness is obviated only when the officer's observation is so clear that identification could not be mistaken.

In the case at bar we have neither a *Rodriguez*- nor a *Wharton*-type scenario. The witness, Patrick Boker, was not familiar with the defendant. Mr. Boker was not a law enforcement official working on a criminal investigation specifically targeted at the defendant. In Mr. Boker's statement to the police he indicated that he was attacked and that "[t]he cops then showed up and I told them what happened. They then found the guy who attacked me and I identified him its (sic) them. I now know the name of the guy to Kenneth McKay." Mr. Boker's statement seem to indicate that the defendant was in some sort of police arranged identification procedure.

The scenario described by Mr. Boker also cannot be considered a "spontaneous" identification or an identification not prompted by police. An identification by a witness may be "spontaneous" in the sense that it is unprompted, yet still be the product of a police-arranged procedure. In an example described in *People v. Dixon* (85 N.Y.2d 218 [1995]) a victim may reflexively point out the perpetrator during a viewing of a videotape of a passerby that was made and supplied by the police (see, *People v. Edmonson*, 75 N.Y.2d 672 [1990]). Under these circumstances, the identification could fairly be characterized as "spontaneous," but it would still be "police-arranged." In contrast, a true "spontaneous"

procedure would exist where a complainant flags down a police officer and then points to the attackers on the street less than two blocks away (see *People v. Rios*, 156 A.D.2d 397 [2 Dept., 1989]). In the case at bar, Mr. Boker's identification can only be described as police arranged.

The Court will grant the defendant's motion to preclude the identification testimony of Patrick Boker to the extent that a *Rodriguez* hearing will be held prior to trial to determine whether the identification procedure used by the police in this case is one for which a suppression hearing is appropriate (*People v. Rodriguez*, 79 N.Y.2d 445 [1992]).

This constitutes the decision and order of the Court.

Dated: Riverhead, New York
April 24, 2006

JAMES HUDSON
J.C.C.