

**People v Brown**

2007 NY Slip Op 34327(U)

December 11, 2007

Suffolk County Ct

Docket Number: 0002142/2007

Judge: James C. Hudson

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

PRESENT:

Hon. JAMES HUDSON

ORIG. RETURN DATE: 11/09/07

FINAL SUBMIT DATE: 11/30/07

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

PLTF'S/PET'S ATTY:

HON. THOMAS J. SPOTA  
Suffolk County District Attorney  
By: ANDREW HEFFERNAN, ESQ.  
200 Center Drive  
Riverhead, New York 11901

-against-

MICHAEL BROWN,

Defendant.

DEFT'S/RESP'S ATTY:

LEGAL AID SOCIETY OF SUFFOLK  
By: KATHLEEN GEARRITY, ESQ.  
Attorneys for Defendant  
300 Center Drive  
Riverhead, New York 11901

Upon the following papers numbered 1 to 7 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 6-7; 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 opposed in part and consented in part. After careful consideration the Court hereby orders the  
following.

**ORDERED**, the defendant's application for further discovery is denied as moot; and it is  
further

**ORDERED**, that the defendant's application for disclosure of exculpatory materials is  
granted to the extent that the People have responded that they have no present knowledge of the existence  
of such materials and have acknowledged their continuing obligation to provide such materials; and it is  
further

**ORDERED**, that the defendant's application for a hearing to determine whether the People  
may introduce the defendant's prior uncharged criminal, vicious or immoral conduct if the defendant  
testifies at trial is granted. A hearing on the matter will be held prior to trial; and it is further

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**ORDERED**, that should the People intend to introduce any prior conviction, uncharged crime or bad acts by the defendant in their case in chief, the People are directed to file a motion *in limine* prior to trial so that a hearing may be held on the matter; and it is further

**ORDERED**, that defense counsel's application to be furnished with the names of all prosecution witnesses who will give jail house admission testimony is granted to the extent that the People have stated in their answer that they have no knowledge of such information and have acknowledged their continuing obligation to provide such information to the defendant upon its discovery; and it is further

**ORDERED** that defendant's application to suppress/preclude the identification procedure in this case is denied as moot; and it is further

**ORDERED**, that the defendant's application for a hearing to determine whether there was 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 is denied; and it is further

**ORDERED**, that defendant's application to dismiss the indictment due to a defective Grand Jury presentation is denied as moot; and it is further

**ORDERED**, the People's cross-motion for reciprocal discovery is granted.

The defendant's omnibus motion requested discovery pursuant to CPL 240.20. The People answered that they have already provided discovery to the defense. 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 defendant's application is denied as moot.

The defendant requested the disclosure of exculpatory materials pursuant to *Brady v. Maryland* (373 U.S. 83, 83 S.Ct. 1194 [1963]). The defendant's application is granted to the extent that the People have stated in their answer that they do not possess any *Brady* material and have acknowledged their continuing obligation to provide the defendant with such materials.

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

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The People are also directed to file a motion *in limine* prior to trial should they intend to introduce any prior conviction, uncharged crime or bad acts by the defendant in their case in chief 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 530, 439 N.Y.S.2d 96 [1981]).

Defense counsel's application to be furnished with the names of all prosecution witnesses who will give jail house admission testimony pursuant to *People v. Cardona* (41 N.Y.2d 333, 392 N.Y.S.2d 6069 [1977]) is granted to the extent that the People have stated in their answer that they have no knowledge of such information and have acknowledged their continuing obligation to provide such information to the defendant upon its discovery.

Defendant next moves to suppress identification testimony on the basis that the identification was unduly suggestive. The People answered that no police-arranged identification procedure was used to identify the defendant. To invoke *Wade* protection (*United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 [1967]), a specific form of identification, namely, a confrontation compelled by the State between the accused and the victim or witness to a crime, is required (*People v. Calinda*, 83 Misc. 2d 520, 372 N.Y.S.2d 479 (Queens Supreme, 1975)). Since there was no police-arranged identification procedure in our case, defendant's motion to suppress is denied.

The Court is aware that this case involves undercover drug sales and that the police made confirmatory identifications of the defendant on the same days the alleged sales occurred. The defendant on the first alleged sale gave the undercover police officer his name. The undercover officer matched his name with a photo on that same day. On the second alleged sale to the same undercover police officer, the officer again viewed the defendant to ensure that they had apprehended the right person. Police confirmation procedures are excluded from CPL 710.30 notice requirements (*People v. Morales*, 37 N.Y.2d 262, 372 N.Y.S.2d 25 [1975]) – a follow-up station house show-up identification of a suspect by a trained and experienced undercover narcotics officer six hours after a buy-and-bust of the suspect was not unduly suggestive; *People v. Wharton*, 74 N.Y.2d 921, 550 N.Y.S.2d 260 [1989]) – confirmation by undercover officer who observed defendant during the face-to-face drug transaction at the station house approximately three hours later did not warrant a *Wade* hearing). In the case at bar the defendant's identification by the police was clearly confirmatory and therefore not subject to CPL 710.30 notice requirements. Defendant's motion to preclude the identification testimony is therefore denied.

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 sworn allegations of fact (CPL 710.60) in support of his application. The Court of Appeals have stated that hearings are not automatic or generally available for the asking by boilerplate allegations (*People v. Mendoza*, 82 N.Y.2d 415, 604 N.Y.S.2d 922 [1993]; *People v. Bryant*, 8 N.Y.3d 530, 838 N.Y.S.2d 7 [2007]). Rather, the Court is required to review the factual sufficiency of the motion, with reference to the

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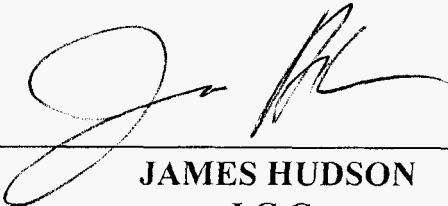
pleadings, the context of the motion and defendant's access to information. The lack of sworn facts to support defendant's request for hearings is fatal to the defendant's application. Therefore the defendant's application for a probable cause hearing and a hearing to suppress evidence is denied.

Defendant's application to dismiss the indictment due to a defective Grand Jury presentation is denied as moot as the Court has previously reviewed the Grand Jury minutes and found them to be sufficient in its decision dated October 16, 2007. The Court considered the defendant's argument in his reply regarding the instructions given to the Grand Jury concerning his prior convictions and have found the instructions sufficient.

The People's cross-motion for reciprocal discovery (CPL 240.30) is granted.

This constitutes the decision and order of the Court.

**Dated: Riverhead, New York**  
**December 11, 2007**

  
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**JAMES HUDSON**  
**J.C.C.**