

**People v Pantoja**

2007 NY Slip Op 34565(U)

September 10, 2007

County Court, Westchester County

Docket Number: 07-0265

Judge: Barbara G. Zambelli

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FILED  
AND  
ENTERED  
ON 9-10-2007  
WESTCHESTER  
COUNTY CLERK

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COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK      DECISION & ORDER

- against -

RAFAEL PANTOJA,

Indictment No.: 07-0265

**FILED**  
SEP 10 2007  
TIMOTHY C. IDON  
COUNTY CLERK  
COUNTY OF WESTCHESTER

-----X

ZAMBELLI, J.

The defendant has been indicted for grand larceny in the first degree (one count), grand larceny in the second degree (three counts), identity theft in the first degree (six counts), grand larceny in the third degree (one count), forgery in the second degree (one count), criminal possession of a forged instrument in the second degree (one count) and scheme to defraud in the first degree (one count) allegedly committed on or about and between January 24, 2004 and January 20, 2005 in the County of Westchester. The defendant now moves by notice of motion and supporting affirmation for omnibus relief, as well as by reply affirmation. The People's response consists of an affidavit in opposition and a memorandum of law. The defendant has also submitted a reply affirmation. Upon consideration of these papers, as well as review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

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1. MOTION TO INSPECT/DISMISS/REDUCE

This application is granted to the extent that the Court has conducted an in camera inspection of the minutes of the grand jury proceedings. Upon review of the evidence presented, this Court finds that all counts were supported by sufficient evidence and that the instructions given were appropriate. There was no other infirmity which would warrant a dismissal of the indictment. Accordingly, that branch of the motion which seeks dismissal of the indictment is denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (see CPL 210.30[3]).

2. MOTION FOR DISCOVERY AND INSPECTION / BRADY MATERIAL

This application is granted to the limited extent of ordering that the People are to provide the defendant with materials and information, the disclosure of which is required pursuant to the provisions of CPL 240.44 and 240.45. As to the defendant's demand for exculpatory material, the People have indicated their awareness of their continuing obligation to disclose any such material immediately upon its discovery. Where a question exists as to whether a particular item should be disclosed, they are directed to submit the material or information to the Court, which will conduct an in camera examination to resolve the issue.

The defendant's demand for disclosure of items or information to which he is entitled pursuant to the provisions of CPL 240.20(1) (a) through (i) is granted upon the People's consent. The application is otherwise denied as it seeks items or information which are beyond the scope of discovery and the defendant has failed to show that such items are

material to the preparation of his defense (CPL 240.40 [1][a]).

3. MOTION TO SUPPRESS PHYSICAL EVIDENCE

The defendant moves to suppress documents produced pursuant to grand jury subpoenas on the grounds that there was no sitting grand jury on the subpoenas' return dates. The People's response notes that for each date that the grand jury subpoenas were for, a grand jury was sitting on each of those days, and that in any event, the defendant lacks standing to challenge these subpoenas which seek records from third parties.

The motion is denied. As an initial matter, the defendant lacks standing to challenge these subpoenas. The subpoenas at issue are addressed to various third parties and call for the production of these parties' own documents for which defendant has no possessory or proprietary interest, or a legitimate expectation of privacy (see People v. Crispino, 298 A.D.2d 220, 221 (1<sup>st</sup> Dept. 2002); People v. MacGilfrey, 288 A.D.2d. 554, 555 (3d Dept. 2001), lv. denied, 97 N.Y.2d 757 (2002); People v. Orzel, 192 A.D.2d 818, 819 (3d Dept. 1993)).

Furthermore, even if the defendant had standing, his motion is without merit. A grand jury subpoena's validity does not depend on the existence of a particular grand jury at any specific time (see Matter of Brunswick Hosp. Center v. Hynes, 52 N.Y.2d 333, 339 (1981)). All that is required is that a grand jury be in session on the subpoena's return date, in the event that the witness requires access to prompt judicial resolution of any challenge to the scope or propriety of his or her examination (see Hirschfeld v. City of New York, 252 A.D.2d 53, 58 (1<sup>st</sup> Dept. 1999)). The People have established that on each of the return dates of the subpoenas, a grand jury was sitting. Thus, the motion is denied.

4. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)

Granted on consent of the People to the extent that this Court directs that a hearing be held immediately prior to trial. Prior to the commencement of jury selection, the People will disclose to defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes (see, CPL 240.43). Defendant must then sustain his burden of informing the Court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf (see, People v. Matthews, 68 NY2d 118 , 121-122). In the event the People seek to introduce defendant's prior bad acts on their direct case, the burden is on the People to seek a Ventimiglia hearing to determine the admissibility of such evidence (see, People v. Ventimiglia, 52 NY2d 350).

5. REQUEST FOR ADDITIONAL MOTIONS

The defendant's request for permission to make additional pretrial motions is denied. Additional motions will only be considered upon good cause shown pursuant to CPL §255.20(3).

This decision constitutes the Order of the Court.

Dated: White Plains, New York  
September 10, 2007

  
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BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

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