

People v Heidt
2010 NY Slip Op 34058(U)
December 6, 2010
County Court, Westchester County
Docket Number: 09-0868
Judge: Barbara G. Zambelli
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

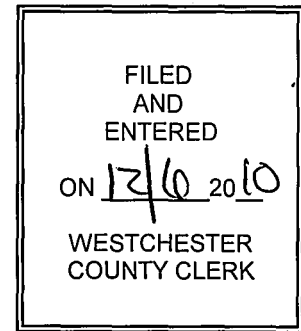
-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

GARRETT HEIDT,

Defendant.

-----X
ZAMBELLI, J.



DECISION & ORDER

Indictment No.: 09-0898

868

The following papers numbered 1 to 6 were read on this motion to set aside the verdict pursuant to CPL Article 330.30:

Notice of Motion, Affirmation of Stewart McMillan, Esq.,
& Exhibits A-S
Affidavit in Opposition, Memorandum of Law & Attachment

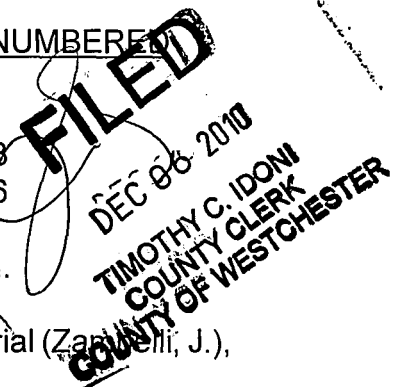
PAPERS NUMBERED

1-3
4-6

Upon the foregoing papers it is ordered that this motion is denied.

On September 2, 2010, the defendant was convicted, after a jury trial (Zambelli, J.), on a partial verdict of resisting arrest; defendant was also acquitted of the top count of the indictment, robbery in the first degree. After being instructed by the Court to continue deliberations, on September 7, 2010, the jury returned a further verdict convicting defendant of robbery in the second degree and criminal possession of stolen property in the fifth degree. On that same date, the Court declared a mistrial on count three of the indictment, criminal possession of a weapon in the fourth degree.

The defendant now moves to set aside the verdict and for a new trial pursuant to CPL §330.30. He argues that the verdict should be set aside and a new trial granted on



several grounds. The People oppose the motion and argue that it should be summarily denied. The Court addresses each of defendant's contentions in turn.

Identification Issues

Firstly, defendant argues that the Court should have granted his motion to suppress identification testimony as a result of the People's failure to provide a CPL §710.30 notice for a photographic identification allegedly made by the complainant and further argues that the complainant should have been precluded from making an in-court identification of defendant. Defendant submits that during cross examination, the complainant, who was testifying via a Spanish interpreter, indicated that he was shown a single photo of the defendant by the police (Defendant's Exhibit I, pp. 35-36) and that the People failed to notice this identification. In opposition, the People submit that the Court properly denied defendant's motion to suppress the identification of the defendant at trial because, they argue, the complainant made a spontaneous, in person identification of the defendant at the scene of the crime when he waved down the police, pointed to the defendant and two other individuals, told the police that defendant and co-defendant's had robbed him and that they had guns. The People argue that there were no other identifications, and that defendant's reference to a "mug shot" photo is a misconstruction of the record; they submit that the witness was referring to being shown a photo of the property taken from him and not a photo of the defendant. They further argue that since no such photo identification occurred, there was no basis to preclude any in-court identification testimony.

The defendant's arguments are without merit and his motion on these grounds is denied. As an initial matter, it is noted that while the defendant alleges in his papers that he moved to reopen the suppression hearing during trial, the transcripts that he attached

to his motion do not support his contention.¹ While defendant now alleges that the pre-trial hearing should be reopened so that the complainant could testify regarding the alleged photo identification to which he testified on cross examination, defendant failed to move to reopen the hearing on that ground during trial, the point at which he alleges the information became known to him. Pursuant to CPL §330.30(1), a trial court's authority to set aside a verdict is limited to grounds which, if raised on appeal, would require reversal as a matter of law. Thus, only a claim that is properly preserved for appellate review may serve as a basis to set aside a verdict (People v. Josey, 204 A.D.2d 571 (2d Dept. 1994)). Thus, as defendant failed to preserve this issue, CPL §330.30(1) bars his motion to set aside the verdict on those grounds (Id.; People v. Gaston, 239 A.D.2d 356, 357 (2d Dept. 1997), lv. denied, 90 N.Y.2d 858 (1997); see also People v. Brown, 67 N.Y.2d 555, 559 (1986), cert. denied, Brown v. New York, 479 U.S. 1093 (1987); People v. Gonzalez, 24 Misc.3d 1243 (Sup. Ct. Bx. Co. 2009)).

Even if defendant had timely moved to reopen the hearing, his motion would fail, as contrary to defendant's assertions, the complainant's testimony under cross examination did not establish that he was shown a photo of this defendant. Defense counsel never asked the complainant whether he was asked by the police to view this defendant; instead,

¹Counsel alleges that "[b]oth at the conclusion of the pre-trial hearing *and during trial*" (emphasis added), he moved to reopen the pretrial hearing "for independent source and/or so that [the complainant] may testify as a witness." (McMillan Affidavit, p. 25) Counsel refers to defense exhibits G and H in support thereof. However, Exhibit G, which contains the pre-trial hearing testimony of PO Ramirez, does not reflect any request by defense for the reopening of the hearing. Exhibit H does reflect that after the Court rendered its pre-trial, oral decision on the suppression hearing, the defendant moved to reopen the Dunaway hearing with the complainant testifying, which motion was denied by the Court (Defendant's Exhibit H, pp. 3-7). However, as these transcripts address pre-trial matters, they obviously do not contain any request by the defense to reopen the hearing subsequent to the complainant testifying. The Court's review of the remainder of the transcripts provided by the defense, including those that contain the complainant's testimony, fail to substantiate defendant's claim that he moved during the trial to re-open the suppression hearing.

counsel inquired whether on the night of the crime, the police asked him to view a “potential suspect”, to which the complainant responded, “Yes. Just a picture.” (Defendant’s Exhibit I, p. 35). Counsel next asked whether the complainant was asked to look at anyone “in person”, to which the complainant responded “No, just the photograph and they show me my cell phone that they take from him.” (*Id.*, pp. 35-36; emphasis added). However, there was another individual apprehended by the police that night at approximately the same time as defendant with whom defendant was charged as acting in concert; upon apprehension, the police recovered the complainant’s cell phone from that co-defendant (Defendant’s Exhibit G, p. 20). Thus, contrary to defendant’s contention, the complainant’s testimony indicated that he was shown a photo of the co-defendant as opposed to defendant. Moreover, despite being free to further explore on cross examination the issue of whether it was the defendant or co-defendant in the photo, counsel for his own strategic reasons chose not to do so. As defendant failed to establish that the complainant was ever shown a photo of him, there was, of course, no basis to reopen the pre-trial hearing.

Relatedly, defendant’s motion based on the Court’s failure to preclude the complainant from identifying the defendant at trial based upon the People’s failure to notice the alleged identification of defendant from a photo must also fail. After a pre-trial Wade hearing, the Court found that no CPL §710.30 identification took place and denied defendant’s motion (Defendant’s Exhibit H, p.1; Decision After Hearing dated August 24, 2010). However, as noted above, defendant has failed to demonstrate that he moved to reopen the hearing subsequent to the complainant’s testimony. He has therefore failed to preserve this issue (People v. Josey, *supra*; People v. Gaston, *supra*; People v. Brown,

supra; People v. Gonzalez, supra). In any event, as noted above, the motion to preclude was properly denied as the record fails to support defendant's contention that the complainant was shown a single photo of him.

Probable Cause for Defendant's Arrest

Defendant next argues that the Court should set aside the jury verdict because all of the evidence should have been suppressed and/or precluded as a result of his arrest, which he asserts was without probable cause. Defendant submits that there was "conflicting and otherwise unreliable testimony regarding what factors led to [defendant's] arrest" and refers to the transcripts of the police officers' testimonies in support of his contention. The People oppose the motion and argue that the defendant's Dunaway motion was properly denied, as they submit probable cause existed for the defendant's arrest based upon the complainant's spontaneous declaration to the police that the defendant and co-defendants, who were standing nearby and pointed out by the complainant to the police, had robbed him and that they had guns.

Defendant's motion on this ground is denied. Once again, as with his allegations regarding the identification testimony, defendant has failed to demonstrate that he moved to reopen the hearing during trial. He has therefore failed to preserve this issue and is thus barred from relitigating it herein (People v. Josey, supra; People v. Gaston, supra; People v. Brown, supra; People v. Gonzalez, supra). In any event, even if he had preserved the issue his motion would fail, as, considering all of the facts and circumstances of this case, including the complainant's on-the-scene, spontaneous point out of the defendant and allegation of a robbery at gunpoint, coupled with the testimony of the responding police officer, probable cause existed for the defendant's arrest (People v. Bigelow, 66 N.Y.2d

417, 423 (1985)). In pointing out what he considers to be “conflicting” and “unreliable” testimony, defendant confuses the issues of the admissibility of evidence with the weight such evidence may be afforded by a jury (see e.g. People v. Moore, 155 A.D.2d 725, 727-28 (4th Dept. 1989), lv. denied, 75 N.Y.2d 773 (1989)). Counsel was able to, and indeed, did explore the alleged conflicts in testimony on cross examination and was free to make his case to the jury regarding the defense’s contentions that the witnesses’ testimonies were conflicting and unreliable.

Fair Trial

Defendant also argues that the People’s summation, coupled with the Court’s alleged refusal to sustain the defense’s objections, deprived the defendant of a fair trial. In support of his motion, defendant alleges that the People improperly characterized his testimony through the use of derogatory words and phrases, misstated the evidence, sought to inflame the juries’ passions, and improperly bolstered the testimony of key witnesses, including on the issue of identification. The People oppose the motion and argue that their summation was fair comment on the evidence and made in response to the defendant’s summation.

Defendant’s motion is without merit and is denied. As an initial matter, it is noted that, while the transcript of the People’s summation was attached to defendant’s motion, defendant failed to produce a copy of his counsel’s own summation, a significant omission given that many of the comments of which defendant now complains were made in direct response to arguments counsel made to the jury. When the defense objected on the ground of characterization to the People’s reference to the defendant’s testimony as “absurd and ridiculous”, the Court admonished the Assistant District Attorney to use

different words (Defendant's Exhibit P, p. 26, 29, 30). As to the People's description of the case as "strong", it is clear that the assistant was requesting that the jury make that inference, given that she began her statement with "I submit to you" (*Id.*, p. 31). As to the defendant's objections to the People's contention that the at the point of the defendant's apprehension he was wearing "the same gray sweatshirt" as at the point of the crime, clearly this was what the People was asking the jury to infer based upon the evidence presented in the case; defendant in his summation had of course argued that he did not commit the crime and that this was a case about mis-identification. Accordingly, the People's summation, taken as a whole, was within the bounds of rhetorical comment permitted in closing arguments, fair comment on the evidence and/or responsive to arguments and theories presented by the defendant's summation and was not unduly prejudicial (*People v. Banks*, 74 A.D.3d 1214 (2d Dept. 2010), *lv. denied*, 15 N.Y.3d 849 (2010); *People v. Torres*, 71 A.D.3d 1063 (2d Dept. 2010), *lv. denied*, 15 N.Y.3d 758 (2010); *People v. Francois*, 281 A.D.2d 431 (2d Dept. 2001), *lv. denied*, 96 A.D.2d 828 (2001)).

Subpoenas

Defendant argues that the Court improperly refused to sign defense subpoenas for police witnesses at the close of the People's case. Defendant sought subpoenas for P.O. Ramirez and P.O. Braig, both of whom testified for the People's case, as well as for for Det. Meehan, who was not called by the People, although he was on their witness list. Defendant argues that he required the subpoenas because the victim testified that he was shown a single mug-shot photo and indicated in his testimony that Det. Meehan and "possibly" P.O. Ramirez were present at this time. He further argues that he wished to

subpoena Det. Meehan because while the victim testified that he did not read or write English, he made and read for accuracy a statement in English which allegedly “differed markedly” from his trial testimony and Det. Meehan assisted him in making his statement; defendant also wished to call Det. Meehan because he alleges that he wished to make a statement regarding his innocence but was allegedly prevented from doing so by the Detective. Defendant argues that he should have been able to call these witnesses because they were on his witness list which was provided to the Court and the People prior to trial. The People oppose the motion. They argue that defendant should not be allowed to subpoena witnesses when he had the opportunity to cross examine them at trial². They further submit that defendant intended to call these witnesses to impeach their credibility and argue that a party may not impeach the credibility of its own witness.

The defendant’s motion on this ground is denied. Initially, as to P.O. Braig, it is noted that in his motion papers, defendant fails to set forth any basis for why he needed to call that officer. In any event, as to both P.O. Ramirez and P.O. Braig, these witnesses were called on the People’s case in chief and defendant had the opportunity to cross examine them at that time. Moreover, defendant sought to call these witnesses, as well as Det. Meehan, for impeachment purposes, which is improper (see People v. Johnson, 143 A.D.2d 847, 848 (2d Dept. 1988); lv. denied, 73 N.Y.2d 856 (1988)). To the extent that defendant sought to call these witnesses regarding the complainant’s alleged testimony regarding being shown a single photo of defendant, the motion is denied for the reasons

²In their motion papers, the People submit that Det. Meehan, P.O. Ramirez and P.O. Braig all testified on the People’s case. This is incorrect, as the transcript of the proceedings relating to defendant’s subpoena request reveals that while P.O. Ramirez and P.O. Braig testified during the People’s case in chief, contrary to the People’s contention, Det. Meehan was not called at trial (Defendant’s Exhibit N, pp. 2-3).

set forth above. As to Det. Meehan and the defendant's wish to call him regarding his alleged wish to make a statement regarding his innocence, the Court properly refused to sign a subpoena for him as the testimony which defendant sought from him would constitute inadmissible, self-serving hearsay (People v. Reynoso, 73 N.Y.2d 816, 819 (1988); People v. Morel, 297 A.D.2d 757 (2d Dept. 2002), lv. denied, 99 N.Y.2d 561 (2002); People v. Sene, 66 A.D.3d 427, 428 (1st Dept. 2009), lv. denied, 13 N.Y.3d 941 (2010)).

Alleged Juror Misconduct

Defendant also alleges that his conviction must be set aside as a result of alleged juror misconduct which came to light after the verdict. Defendant alleges that after the verdict was issued, the jury foreperson approached defense counsel and the defendant's mother and alleged that he felt pressured and coerced into rendering a verdict by his fellow jurors. Defendant further alleges that the foreperson advised that he believed the majority of the jury was in favor of a guilty verdict even before the evidence commenced and that he was unaware that he could maintain that he believed defendant was guilty and thereby "force a deadlock." Defendant contends that the foreperson also advised that he was concerned that if the jury did not arrive at a verdict, and deliberations continued, it would cause problems with his job. The People oppose the motion and argue that the defendant has failed to provide any affidavit from the jury foreperson in support of the allegations made in his motion. They further argue that, even if they were true, a juror's alleged feeling of coercion or pressure is insufficient to set aside a verdict.

Defendant's motion is summarily denied as defendant has failed to support the hearsay allegations in his motion papers with any affidavit from the juror in question and therefore his moving papers do not contain sworn allegations of fact essential to support

the motion (CPL §330.40(2)(e)(ii); People v. Busreth, 35 A.D.3d 965 (3d Dept. 2006), lv. denied, 8 N.Y.3d 920 (2007)). The motion is further denied, as proof of the tenor of jury deliberations or belated misgivings on the part of jurors cannot be used to impeach a verdict (People v. Brunson, 66 A.D.3d 594, 595 (1st Dept. 2009), lv. denied, 13 N.Y.3d 937 (2010)). Defendant therefore fails to allege any ground constituting a legal basis for the motion (CPL §330.40(2)(e)(i)).

Weight of the Evidence

As to the verdict itself, defendant argues that it should be set aside as being against the weight of the evidence. The People oppose the motion as unpreserved for review and in any event, without merit, because they assert that a trial court is powerless to make any weight of the evidence determinations.

Defendant's motion is denied. Initially it is noted that, at the end of the People's case, defendant made a motion "for a directed verdict"³ on the grounds that there was conflicting and insufficient evidence of identification and that defendant possessed a weapon and asked for a "directed verdict" on the robbery and weapons possession charges; he also asserted that there was insufficient evidence to support the resisting arrest charge (Defendant's Exhibit L, pp. 1-2). In his instant motion, he challenges the robbery in the second degree and criminal possession of stolen property in the fifth degree convictions because, he alleges, these convictions relate to the possession of the complainant's cell phone, which was found on the co-defendant's person, and he submits that there was insufficient evidence to establish that defendant aided and abetted the co-

³While counsel erroneously referred to his motion as one for a "directed verdict", it was clear to all parties that he was seeking a trial order of dismissal (Defendant's Exhibit L).

defendant, whom he asserts he did not know. He further alleges, as he did at the close of the People's case, that there was insufficient evidence of identity. Thus, defendant's contentions regarding the cell phone and his allegations of insufficiency to establish defendant was aiding and abetting the co-defendant were raised for the first time in this motion.

As defendant failed to preserve the issues regarding the cell phone and aiding and abetting by moving for a trial order of dismissal at trial as to his contentions, CPL §330.30 bars his motion to set aside the verdict on those grounds (People v. Josey, *supra*; People v. Gaston, *supra*; People v. Brown, *supra*; People v. Gonzalez, *supra*).

As to defendant's remaining allegations that the verdict was against the weight of the evidence, his motion is denied as a trial court is powerless to set aside a verdict on the ground that it is against the weight of the evidence (People v. Carter, 63 N.Y.2d 530, 536 (1984); People v. Pirozzi, 237 A.D.2d 628, 630 (2d Dept. 1997), *lv. denied*, 90 N.Y.2d 909 (1997)). Rather, in considering a motion to set aside the verdict, a trial court considers whether the evidence was legally sufficient (People v. Pirozzi, *supra*). Thus, the question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt (*Id.*, citations omitted). Applying this standard, defendant's motion is denied as the evidence adduced at trial was legally sufficient to establish that the defendant committed the crimes of which he was convicted⁴.

⁴It is noted that even if defendant had preserved the issues regarding his contentions regarding the cell phone and aiding and abetting, his motion would still fail as legally sufficient evidence was adduced at trial to support defendant's convictions.

Alleged Prejudicial Comments By the Court

Defendant moves to set aside the verdict on the grounds that this Court prejudiced his right to a fair trial by engaging in “inappropriate colloquy with defendant’s counsel and the Defendant on numerous occasions throughout the trial” which alleged conduct he submits had the cumulative effect of usurping the jury’s role as trier of fact in this case. The People oppose the motion.

Defendant’s motion is denied, as he was not denied a fair trial. The Court notes that throughout this case, counsel repeatedly and persistently engaged in conduct before the jury which required admonishment by the Court, including attempts to misconstrue the record and mis-characterize evidence (see e.g. Defendant’s Exhibit I, pp. 25-26; 31-32, 46-48, 55) and continued efforts to reargue the Court’s evidentiary rulings during trial (see e.g. Defendant’s Exhibit I, p. 15; Exhibit K, pp. 37-38, 53). While the Court regrettably was required to repeatedly admonish counsel as a result of his own conduct, the rulings were made with significant judicial restraint given counsel’s conduct, and were appropriate and designed only to enforce propriety, orderliness, decorum and expedition in the trial (People v. Pierce, 303 A.D.2d 314, 315 (1st Dept. 2003), lv. denied, 100 N.Y.2d 565 (2003)).

Initially, as to defendant’s attempts to characterize the Court’s comments, it is noted that nothing in the record supports counsel’s contentions. Despite counsel’s current contentions of prejudice, counsel never objected to the Court’s alleged tone or behavior during trial or attempted in any way to place such alleged prejudicial behavior on the record (which would have, of course, given the Court or the People an opportunity to respond), despite the fact that counsel was amply able to voice his objections as to other matters.

As to defendant's specific allegation that the Court acted inappropriately in commenting "hoo boy, come on" when, according to counsel, he "was trying to explain the defendant's hand gestures for the Court stenographer", counsel's contentions are false and belied by the record. Initially, it is noted that counsel's motion papers are misleading in that they imply that he was attempting to clarify a record for the complainant who had difficulty with the English language (McMillan Affirmation, p. 41), because, as counsel was obviously aware, the complainant testified at trial with the assistance of a Spanish interpreter (Defendant's Exhibit I, p. 1). Moreover, his statement in his motion that "the victim was saying that the defendant was on his left side and motioned with his left hand" is also false, because, as demonstrated by the record, counsel's alleged "explanation" for the court reporter was that the complainant's "right side" would be "his right side as I'm facing him" (Defendant's Exhibit I, p. 47), i.e., the complainant's actual left side, which of course is not true, given that a person's right side does not change into his left side merely because it corresponds to the left side of the person facing him. Thus, as opposed to clarifying the record, counsel deliberately attempted to create an ambiguity in the record where there was none, forcing the Court to have to take judicial notice of the fact that the complainant was indeed gesturing to his actual right side (Id., p. 48). Given the complete novelty of counsel's contention that one's left or right side can be variable to one's surroundings, a contention so illogical that it could not possibly have been made in good faith, the Court exercised considerable judicial restraint in limiting its comments. As to defendant's contention that the Court inappropriately commented on his objection to the complainant's in-court identification, the Court merely clarified the basis of his objection and appropriately prevented from counsel re-arguing the issues already decided in the pre-trial Wade

hearing, which, again contrary to counsel's contention in his motion papers, he attempted to do before the jury (Id., p. 15). As to trial objections, the Court did indeed insist that objections be made on a one word basis, so as to avoid improper argument before the jury, but, as defendant neglects to mention in his papers, this restriction was applied to the People as well as to the defense (see e.g. Defendant's Exhibit K, pp. 45, 65). As to defendant's objection to the introduction at trial of defendant's "mug shot" photo, the Court appropriately ruled it was relevant (see e.g. People v. Walker, 217 A.D.2d 856, 858 (3d Dept. 1995) (noting that mug shots are admissible as relevant to a defendant's change in appearance at trial)) and appropriately admonished counsel not to argue in front of the jury, which he continued to do despite the Court advising him that he would be allowed to make his case outside the jury's presence, thus requiring further admonishment (Defendant's Exhibit K, p. 37, 38). As to defendant's allegations regarding the Court's ruling on objections, the record of the trial as a whole demonstrates that the Court ruled fairly on both the defendant's, as well as the People's, objections. In sum, the comments of which defendant complains resulted from his counsel's own conduct before the Court⁵ and the Court's responses thereto did not deprive the defendant of a fair trial.

Gun History

Lastly, defendant claims that the verdict should be set aside based upon the People's failure to provide the defendant with a history of the gun recovered in the case. The testimony at trial from P.O. Braig was that he observed the defendant, who was running from and being pursued by the police, discard an object into the woods, and when

⁵It is further noted that the Court was required to interrupt the People's summation five times to admonish the defendant himself, who kept turning around to talk to his mother in the audience (Defendant's Exhibit P, pp. 4, 23, 24, 26-7).

the police looked in the area where defendant had been observed discarding the object, the gun at issue was found. The defendant asserts that both before and after the pre-trial hearings, he requested a history of the gun because the defendant denied ownership of it and if the history revealed that the gun belonged to another party, it would constitute Brady material. The People oppose the motion and argue that, as an initial matter, defendant was acquitted of criminal possession of a weapon in the fourth degree. They further argue that upon defendant's request, they attempted to obtain a history of the gun, but that the police did not do a trace on it. In any event, in response to defendant's application, the People contacted the Westchester County Intelligence Center, who provided a report indicating that the gun could not be traced because of "unknown manufacturer, unknown country for trace, unknown importer." (People's Attachment). They note that, in any event, given the testimony at trial regarding the police observations of defendant discarding an object as well as the recovery of the gun from that area, defendant's allegations regarding the gun ownership is speculative.

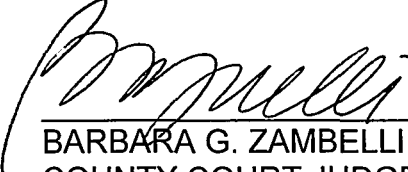
Defendant's motion is denied. Firstly, it is noted that defendant was not convicted on the weapons count and the robbery in the second degree count for which he was convicted related to he or another participant in the crime displaying what appeared to be a firearm; it is also noted that the victim had alleged that there was more than one gun involved in the crime. In any event, it is noted that, despite the fact that the case has been pending since May, 2009 and defendant had received consent discovery on March 10, 2010 and a ruling on his omnibus motion on May 13, 2010, defendant waited until Thursday, August 19, 2010 to request a history of the gun, when hearings and trial were

scheduled to commence on Monday, August 23, 2010.⁶ Thus, defendant's request was grossly untimely. Despite that fact, the People still made good faith efforts to acquire the information for the defense and indeed, provided the defendant with a gun inquiry wherein the serial number of the gun was run to see if it was stolen (Defendant's Exhibit G, p. 3). The People also indicated that they had made efforts to obtain the history defendant belatedly requested but they did not obtain the same before trial (Id.). As to defendant's contention that the history of the gun constituted Brady material, his contention is speculative (see People v. Parkinson, 268 A.D.2d 792, 793 (3d Dept. 2000), lv. denied, 95 N.Y.2d 801 (2000)). In any event, it is noted that, given the testimony regarding the gun at trial, even had a gun history been obtained which listed a current owner of the gun (an unlikely scenario given the information now attached to the People's motion response), the gun was clearly not in the possession of any such alleged owner at the point it was recovered by the police, thus, the defendant has failed to establish the relevance of this evidence.

Accordingly, defendant's motion is summarily denied in its entirety.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
December 10, 2010


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

⁶It is further noted that counsel represented to the Court that he had requested the history of the gun in his motion papers; however, after the Court read through counsel's motion papers twice and told him that she did not find any such request, counsel admitted that he had made the request "within the last week and a half." (Defendant's Exhibit H, pp. 2-3).