At a term of the County Court held in and for the County of Wayne at the Hall of Justice in Lyons, New York on the 19th day of December, 2010.

Present: Honorable Daniel G. Barrett

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF NEW YORK

DECISION
Ind. No. 10-124

-vs-

ANDREW J. WALDEN,

Defendant

Appearances: Assistant District Attorney - Christopher Bokelman, Esq.
Public Defender - James Kernan, Esq.

Defense having filed a Notice of Motion requesting various relief. Oral argument having been had on the above date. The Court having reserved on the motion and sets forth below its decision.

Defense seeks the discovery of certain items. Included in that request are photographs and any forensic analysis of the Defendant's two cell phones. The People having provided the photographs to the defense attorney in Court. In regard to the forensic analysis of the cell phones, People having advised there is no such analysis. However, Mr. Bokelman having stated on the record that if any analysis was done in the future that said analysis would be provided to defense counsel.

Defense counsel seeks to receive a copy of Vickie Winner's medical

records and a copy of the Grand Jury testimony of Payton Winner. People having argued that the medical records could be viewed at the District Attorney's Office by the defense and that secondly the release of the Grand Jury testimony of Payton Winner is not appropriate based on current case law.

Defense also requests a Bill of Particulars and the People having argued that the request for the same was untimely.

Defense also seeking the Court to inspect the Grand Jury Minutes and dismiss the felony counts: Count 6 - Assault 1st ; Count 7 - Assault 2nd ; Count 8 - Reckless Endangerment 1st; Count 9 - Criminally Negligent Homicide; and Court 10 - Endangering the Welfare of a Child.

With regard to the defense requests pursuant to paragraphs 5,6 and 7 of Defendant's Motion, the Court finds said requests either to be premature or duplicative pursuant to Brady, Rosario, and Ventimiglia.

With regard to request made pursuant to paragraph 8, the Court will grant a Huntley and Wade hearing.

With regard to paragraph 9, there are no statements attributed to the Defendant that are not noticed pursuant to CPL 710.30. The Court will allow re-argument pursuant to this request if any statements are noticed by the People to be admitted at trial that are not pursuant to the CPL 710.30 notice.

Defense seeks pursuant to paragraph 10 of the Motion, additional discovery under a Motion depending on information provided. The Court

will reserve any further requests made at the appropriate time.

The Court has examined the Grand Jury Minutes as well as Exhibits admitted pursuant to said testimony. The Court will first discuss Count 6, Assault in the 1st Degree pursuant to PL 120.10(3). Count 6 provides that Defendant on or about May 4, 2010 under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to another person and thereby caused serious physical injury to another person. The key phrase in said charge is "depraved indifference to human life."

To establish depraved indifference for the purposes of Assault 1st, it must be shown that the Defendant's reckless conduct is imminently dangerous, presents grave risk of death, People v. Parrotte, 267 A.D. 2d 884, 3rd Department, 1999, leave to appeal denied, 95 N.Y. 2d 801.

Depraved indifference to human life as used in the first degree Assault statute refers to wantonness of Defendant's conduct, and focuses upon objective assessment of degree of risk presented by Defendant's reckless conduct, People v. Lucchese, 127 A.D. 2d 699, 2nd Department 1987, appeal denied 69 N.Y. 2d 1006.

Where Defendant's conduct endangers only a single person, to sustain a charge of depraved indifference, there must be proof of wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrators inexcusable acts, People v. Coon, 34 A.D. 3d 869. That case goes on to state that depraved indifference required for a conviction of Assault 1st Degree is a culpable mental state, and this

element is not established merely by proof of reckless conduct.

In this particular case testimony reasonably indicates that the Defendant who is a patient of a methadone clinic on May 4, 2010 obtained a dose of methadone which he took and brought a dose home in a special case provided to him by the clinic at Strong Memorial Hospital. Defendant, who was familiar with the victim, Vickie Winner, went to her home and dropped an amount of the methadone off with Vickie Winner's daughter, Payton Winner advising Payton Winner that this would help her mother sleep.

Defendant returned to the residence of the victim and brought the remaining dose of his methadone into the house. At some point the victim asked for additional methadone and Defendant offered to measure an additional amount for her. Testimony is clear and consistent that the victim simply grabbed the bottle of methadone and drank the remaining amount.

Taking into account the standards for inspection of Grand Jury Minutes and viewing the evidence in the most favorable light to the People, there is no testimony and/or Exhibits that show any amount of depraved indifference by the Defendant. Although his conduct may have been reckless and/or abhorrent, it does not rise to the level of depraved indifference. Therefore, the charge of Assault 1st Degree is hereby dismissed.

With regard to Count 7, Assault 2nd Degree, PL 120.05(4), the Defendant is accused of recklessly causing physical injury to Vickie Winner by means of a dangerous instrument, to wit, methadone.

Under the case law the Defendant must be aware and consciously disregard substantial and unjustifiable risk that his actions would result in serious physical injury.

In reviewing the evidence as required by review of the Grand Jury testimony, the Court finds that the Grand Jury could reasonably find there was reasonable cause to believe that the Defendant engaged in conduct resulting in Assault in the 2nd Degree. Therefore, the motion to dismiss Count 7 is hereby denied.

With regard to Count 8, Reckless Endangerment 1st Degree, PL 120.25 Defendant is charged that he evinced a depraved indifference to human life and recklessly engaged in conduct which created a grave risk to another person.

Without belaboring the point, the Court has previously discussed standards for depraved indifference to human life.

First degree Reckless Endangerment differs from second degree Reckless Endangerment in two critical respects. Firstly, the Defendant's conduct must create not merely a substantial risk of serious physical injury but a grave risk of death. Secondly, the Defendant must act not only with mens reas of recklessness, but with an additional mens reas of depraved indifference to human life. To establish the later of mens reas, his conduct must reflect an utter disregard to the value of human life and reflect wickedness, evil or inhumanity as manifested by brutal, heinous and despicable acts. As in the depraved indifference murder and assault context, prosecutions for first degree Reckless Endangerment should now be relatively rare. Statute will apply primarily to conduct that endangers

people indiscriminately, such as firing a gun into a crowd, causing a fire or explosion, or driving with extraordinary recklessness, see People v. Finegold, 7 N.Y. 3rd 288, People v. Suarez, 6 N.Y. 3d 202, People v. Coon, 34 A.D. 3d 869 and see 6 N.Y. Practice, Criminal Law Section 5:19.

Therefore, based upon the above there is no evidence to sustain a charge of Reckless Endangerment in the 1st Degree however, the Court will allow a reduced charge of Reckless Endangerment in the 2nd Degree, see People v. Corliss, 51 A.D. 3d 79 and People v. Hatch, 66 A.D. 3d 1494.

With regard to Count 9, Criminally Negligent Homicide, PL 125.10 the Court notes the following definition of the term Criminally Negligent: a person acts with criminal negligence with respect to death when:

A. that person engages in blameworthy conduct so serious that it creates or contributes to a substantial and unjustifiable risk that another person's death will occur,

B. and when he fails to perceive that risk,

C. and when the risk is of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Case law has held that whether a Defendant is criminally liable for providing a willing victim with a means of his own destruction depends on whether that self destruction itself was foreseeable, People v. Pinckney, 38 A.D. 2d 217.

Defense counsel rightfully points out the distinction of the conviction for Criminally Negligent Homicide in People v. Galle, 77 N.Y.2d 953.

Although apparently Mr. Walden supplied the methadone, Vickie Winner voluntarily drank the methadone and did so after Mr. Walden offered to measure the same for her. This is not the type of conduct that was contemplated by the legislature and subsequently interpreted by case law.

To constitute Criminally Negligent Homicide regarding the providing of drugs from the actor to the victim there has to be more than simply supplying the drugs. In the Galle case Defendant was found to have injected cocaine into his girlfriend on two occasions on the same day, with the knowledge that she was going to continue to inject herself with cocaine that day. In People v. Pinckney, Supra, the Defendant who provided the syringe was held not criminally liable for the buyer's later death from the heroin. The Court noted that a seller of a substance that it is obviously poisonous, such as root alcohol, will be liable for the resulting death of the buyer who drinks it. The sale of heroin was different, however, since injecting heroin does not usually cause death. That would be the same for methadone. There has to be more participation or acts by the actor than simply providing the drugs. There has to be an awareness on the Defendant's part of the ongoing effect of drugs on the victim's body at the time of the fatal injection. Certainly the more vulnerable the victim is, the more responsible the actor is. In this particular case, the victim was sitting at the kitchen table doing homework just before she drank the fatal dose. Therefore, Count 9 is dismissed.

Defense seeks to dismiss Count 10, Endangering the Welfare of a

Child. The Court finds that based on the testimony and evidence presented to the Grand Jury, the Grand Jury could find reasonable cause for the offense of the Endangering of the Welfare of a Child in regard to Payton Winner.

The Court finds that the instructions provided to the Grand Jury were sufficient and appropriate.

Defense requests a Bill of Particulars. The People object to the same as untimely and over broad. Part of the request for Bill of Particulars is moot based upon the Court's Decision as set forth above. The Court will allow the demand based upon good cause shown as follows: response to paragraph 2; response to paragraph 3 with regard to the reduced charge of Reckless Endangerment 2nd and response to paragraph 5 - Endangering the Welfare of a Child. People are required to provide items of factual information which are not recited in the Indictment and which pertain to the offenses charged as set forth above including the substance of the Defendant's conduct encompassed by the above charges which the People intend to prove at trial on the direct case. However, the prosecution is not required to include in the Bill of Particulars matters of evidence relating to how the People intend to prove the elements of the offenses charged as set forth in this Decision or how the People intend to prove any item of factual information included in the Bill of Particulars.

Defense seeks a copy of the Grand Jury testimony of Payton Winner. The Court is aware of the competing interests. Release of said information to the defense is completely within the discretion of the Court. Based upon the Court's above Decision regarding the charges, the Court finds there is not a sufficient compelling interest to require the release of Payton

Winner's Grand Jury testimony.

The defense requests copies of medical records, medical examiner's reports and/or toxicology reports with regard to Vickie Winner. The Court is cognizant of the fact that the victim's cause of death is essential to the People's case and that the medical records will certainly have to be submitted as evidence at trial. It is therefore compelling that the Defendant be aware of said evidence and providing a copy of the same at trial will not allow the defense to sufficiently prepare for trial. Therefore, the Court will order the People to provide to defense counsel copies of Vickie Winner's medical records, medical examiner's report and/or toxicology reports in a timely manner. Said records are to remain confidential and sealed except to allow the defense to provide copies to any expert to be called by defense with regard to issues of Vickie Winner's medical status and cause of death.

In conclusion the Court finds as follows:

1. copies of photographs have been provided;

2. copies of any forensic analysis of Defendant's two cell phones will be provided if and when the same is completed;

3. prosecution will provide in a timely fashion to the defense copies of Vickie Winner's medical records and any report of the medical examiner and/or toxicology reports of Vickie Winner;

4. denial of the copy of the Grand Jury testimony of Payton Winner;

5. prosecution will provide the Bill of Particulars to defense as set forth above;

6. the Court finds the instructions to the Grand Jury to be appropriate and adequate;

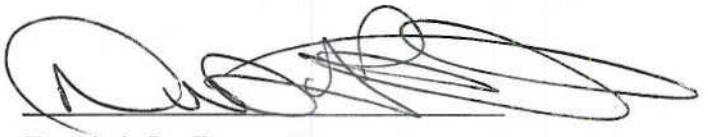
7. the Court dismisses Count 6 of Assault 1st ; reduces Count 8 to Reckless Endangerment 2nd ; dismisses Count 9;

8. Huntley and Wade hearing is granted;

9. any further request by the defense is hereby reserved for future application and/or argument.

This constitutes the Decision of the Court.

Dated: January 10, 2011
Lyons, New York



Daniel G. Barrett