

People v Powell

2011 NY Slip Op 34225(U)

August 25, 2011

Supreme Court, Westchester County

Docket Number: 11-0195

Judge: Albert Lorenzo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

FILED and ENTERED
August 26, 2011
WESTCHESTER
COUNTY CLERK

-against-

REGINALD POWELL,

FILED
AUG 26 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendant.

DECISION & ORDER

Indictment No. 11-0195

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LORENZO, J.

By notice of motion, the Westchester County District Attorney's Office moves this Court pursuant to Criminal Procedure Law § 240.40(2)(b)(v) to enter an order directing the defendant to submit to the taking of buccal cell samples from his mouth in connection with the above-referenced indictment. In resolving the instant application, this Court has considered the notice of motion, affirmation in support and memorandum of law of Assistant District Attorney Timothy R. Ward and the affirmation in opposition of counsel for the defendant, Allen Focarile, Esq. Upon consideration of the foregoing, the instant application is resolved as follows:

Pursuant to Indictment Number 11-0195, the defendant presently stands charged with a single count of Murder in the first degree in violation of Penal Law § 125.27(1), a single count of Murder in the second degree in violation of Penal Law § 125.25(1), a single count of Burglary in the second degree in violation of Penal Law § 140.25(2), two counts of Grand Larceny in the third degree in violation of Penal Law § 155.35(1), two counts of Criminal Possession of Stolen Property in the third degree in violation of Penal Law § 165.50, a single count of Criminal Possession of a Controlled Substance in the third degree in violation of Penal Law § 220.16, and a single count of Criminal Possession of a Controlled Substance in the seventh degree in violation of Penal Law § 220.03. In support of the charged crimes, it is alleged, in part, that on or about and between

December 28, 2010 and December 30, 2010 the defendant intentionally caused the death of Jennifer Katz by fatally stabbing her in the neck and thereafter stole items of jewelry and an automobile from her home.

Following the defendant's apprehension by law enforcement authorities after unsuccessfully attempting to flee from the above-referenced stolen automobile on December 30, 2010, the defendant stated that he had been in the home of Jennifer Katz on December 28, 2010 when he observed her lifeless body and stole her jewelry and automobile. The defendant further stated that he had been involved in a sexual relationship with the victim, but had not engaged in sexual intercourse with her for approximately two weeks prior to December 30, 2010, and thereafter consented to provide the authorities with a buccal cell sample. The deceased body of Jennifer Katz (hereinafter, victim) was located by members of the Village of Mamaroneck Police Department within a closet of her home and an autopsy was subsequently conducted by the acting Westchester County Medical Examiner, Dr. Kunjlata Ashar, who preserved vaginal swabs, nail clippings and clothing from the body of the deceased. Subsequent forensic examination revealed that the DNA profile generated from the defendant's buccal cell sample matched that generated from the fingernails, vaginal swabs and underwear removed from the deceased victim's body. In addition, two pair of men's underwear which had been recovered from the victim's bedroom were subsequently forensically examined by members of the Westchester County Department of Laboratories and Research and compared with the defendant's known DNA profile, which revealed the presence of semen thereon and indicated that the defendant was a potential donor of same. The People assert that these samples have been preserved and would be suitable for further forensic analysis and comparison with a new buccal cell sample obtained from the defendant.

Through the instant application, the People seek an order of this Court compelling the defendant to submit to the taking of a buccal swab in order to enable the People to conduct forensic examination and comparison between the genetic profile of the buccal cell samples to be obtained from the defendant and the genetic profile of the semen recovered from the victim's body and the men's underwear recovered from the victim's home. The defendant opposes the instant application upon several grounds, including the failure of the People to provide the defense with various items of discovery pertaining to the forensic analyses previously conducted, the failure of the People to support the instant application with sufficient sworn factual allegations, the absence of any charges pertaining to sexual acts in the instant indictment and the unreliability of the scientific principles underlying the so-called "Product Rule".

Pursuant to CPL 240.40(2)(b)(v), the People are specifically authorized to seek a court order compelling an indicted defendant to furnish the prosecution with non-testimonial evidence concerning samples of bodily material, including that obtained through the use of a buccal swab. Pursuant to the holding of the Court of Appeals in *Matter of Abe A.* (56 NY2d 288, 291), the applicable standard governing the issuance of an order to compel an individual to furnish non-testimonial evidence to the prosecution requires that the following three elements be established: (1) that there exists probable cause to believe that the individual from whom non-testimonial evidence is sought has committed the crime under investigation, (2) that there exists a clear indication that relevant and material evidence will be found as a result of the disclosure of the non-testimonial evidence sought, and (3) that the method used to obtain the non-testimonial evidence sought is safe and reliable (*see People v King*, 232 AD2d 111, *app. denied* 91 NY2d 875; *Matter of Anonymous v Cacciabauda*, 153 AD2d 856, *app. denied* 74 NY2d 890; *Matter of Santorelli v District Attorney*

of Westchester County, 252 AD2d 504, 505; *Matter of Chaplin v McGrath*, 215 AD2d 842; *Matter of Vivanco v West*, 214 AD2d 618). In addition, the Court of Appeals further requires that the issuing court consider the seriousness of the crime under investigation, the significance of the evidence sought and the availability of less intrusive means of obtaining it, thereupon balancing these concerns against the individual's constitutional right to be free from bodily intrusion (see *Matter of Abe A.*, *supra*, at 291; *People v King*, *supra*, at 116).

Upon consideration of the merits of the instant application insofar as the existence of probable cause is concerned, the Court finds that probable cause to believe that the defendant has committed the charged crimes is demonstrated through the return of the instant indictment against the defendant by a Westchester County Grand Jury following the presentation of evidence concerning the crimes charged under the instant indictment. With respect to the Court's assessment of the existence of a clear indication that relevant material evidence will be found as a result of the disclosure of the non-testimonial buccal swab sample sought, this Court finds that the confirmation of the results of previously conducted forensic analyses indicating that the defendant was the source of the semen and other DNA-bearing material recovered from the body of the victim and from her home establishes the necessary clear indication that relevant material evidence will be obtained as a result of the taking of a buccal swab exemplar from the defendant (*People v Allweis*, 48 NY2d 40, 50; *Matter of Cacciabaudo*, *supra*, at 858; *Matter of Eric Price*, County Ct., Westchester County, Sept. 10, 1997, Lange, J., indictment No. 97-0771). Upon further considering whether the method proposed to obtain the buccal swab exemplar from the defendant is safe and reliable, the Court finds that so long as the taking of the buccal cell sample is performed by a trained professional, in accordance with accepted medical procedures prescribed for the taking of a buccal cell sample, the

method to be utilized will be deemed safe, reliable and free from unreasonable intrusion or risk of serious physical injury.

Upon consideration of the seriousness of the crimes under investigation, the Court notes that the defendant is presently charged with several crimes based upon allegations that he committed a fatally violent assault upon a woman, which resulted in his indictment for several violent felony offenses including the crimes of Murder in the first and second degrees among other lesser felony offenses, which constitute violent felony offenses within the meaning of Penal Law § 70.02(1)(a) and (c). Concurrently, the Court also evaluated the significance of the evidence sought by the People through the instant application and found that the buccal cell sample sought constitutes material evidence which is probative and relevant to confirm the identity of the person who committed the charged crimes. Furthermore, the Court finds that no less intrusive means of obtaining a buccal swab exemplar from the defendant is available. Indeed, neither the People, nor counsel for the defendant have suggested any less intrusive alternative means by which the People might obtain a buccal swab exemplar from the defendant. Finally, upon weighing the above concerns against the defendant's constitutional right to be free from the bodily intrusion involved in the taking of a court-ordered buccal swab exemplar, this Court finds that the balance weighs in favor of granting the People's application for an order compelling the defendant to submit to the taking of a buccal swab exemplar.

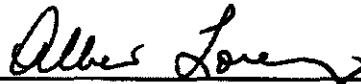
To the extent that the defense has opposed the instant application upon discovery grounds, such grounds do not bear upon the merits of the instant application and are unavailing. Similarly, the defense challenge to the sufficiency of the factual allegations raised in support of the instant application, as well as the absence of any charges pertaining to sexual acts within the instant indictment are not grounds upon which such an application may be assailed and are unavailing.

Finally, to the extent that the defense challenges the reliability of the scientific principles underlying the so-called "Product Rule", the speculative nature of the defense claim that the People's forensic analyses relied upon such principles compels the rejection of this challenge upon consideration of the instant application, although the Court does not hereby rule upon the potential applicability of such a challenge by the defense during the cross-examination of the People's witnesses at trial.

Accordingly, the People's present application seeking an order of this Court compelling the defendant to submit to the taking of a buccal cell sample is granted. In this regard, the buccal cell sample is to be taken from the defendant at the Westchester County Jail and shall be performed by a trained professional, in accordance with accepted medical procedures prescribed for the taking of a buccal cell sample, in order to ensure that the method to be utilized shall be safe, reliable and free from unreasonable intrusion or risk of serious physical injury to the defendant. The defendant's attorney, Allen Focarile, Esq., is consequently directed to contact Assistant District Attorney Timothy R. Ward of the Westchester County District Attorney's Office within seven (7) days following the entry of this Decision and Order in order to arrange a mutually convenient date and time for the taking of the buccal cell sample in a manner consistent with the terms set forth herein, but in no event shall this procedure be conducted later than thirty (30) days from the date of the entry of this Decision and Order without further leave of this Court.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
August 25, 2011



Honorable Albert Lorenzo
Acting Justice of the Supreme Court