

**People v Morris**

2012 NY Slip Op 32805(U)

November 14, 2012

County Court, Wayne County

Docket Number: 12-98

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
COUNTY COURT COUNTY OF WAYNE

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PEOPLE OF THE STATE OF NEW YORK

-vs-

JONATHAN R. MORRIS,

Defendant

DECISION  
AND  
ORDER

Ind. No. 12-98

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Appearances:

Wayne County District Attorney  
Jacqueline A. McCormick, Esq., of Counsel  
For the People

Marc Infantino, Esq.  
For the Defendant

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The Defendant Jonathan Morris has been indicted on one (1) count of Burglary in the Second Degree; three (3) counts of Petit Larceny; and two (2) counts Grand Larceny in the Fourth Degree. The Defendant by his attorney has filed an omnibus motion, seeking dismissal of the Indictment, and requesting inspection of the Grand Jury minutes, as well as discovery pursuant to Brady, Sandoval, Ventimeglia and Molineux. A hearing has been scheduled to determine the existence of probable cause for the Defendant's arrest, together with the admissibility of statements and

physical evidence. The People have consented to provide discovery prior to trial, in accordance with applicable statutes and case law.

A separate Decision and Order has been issued by this Court regarding its inspection of the Grand Jury minutes. The Court has found that the evidence presented to the Grand Jury was legally sufficient, that the District Attorney properly instructed the Grand Jury, and that the proceedings, having conformed with statutory requirements, were not defective.

The Defendant has raised two issues regarding the validity of the Indictment which will be addressed specifically. First, the Defendant maintains that Count One of the Indictment is insufficient on its face, in that it fails to state that the Defendant's entry into the subject premises was "unlawful", as required by the statutory definition of Burglary in the Second Degree .

The Court acknowledges that the word "unlawfully" does not appear in the original Indictment. However, the People have moved to amend Count One to include the necessary language. Counsel for the Defendant argues that the People are not authorized to request such an amendment, as the failure to include unlawfulness as an element in the Indictment

constitutes a violation of both jurisdictional and statutory pleading requirements, and is therefore not subject to amendment under CPL §200.70.

However, the Court of Appeals disagreed with this argument in People v Wright, 67 NY2d 749 (1986), a case in which the Defendant had been charged with Burglary in the Third Degree by a count which inadvertently omitted the word "unlawful". The court held that, since the indictment specifically charged the Defendant with burglary "in violation of Penal Law §140.20", the count sufficiently incorporated the statutory elements of the offense, including "unlawfulness". Therefore, the Indictment was not jurisdictionally defective.

This Court's inspection of the Grand Jury minutes confirms that there was sufficient evidence provided by the testimony of the witnesses to establish the unlawfulness of the Defendant's entry into the subject premises. Also, the Grand Jury was given adequate instructions by the District Attorney, advising them that the entry of the Defendant must be unlawful, in order to constitute a burglary.

The Defendant also argues that CPL §200.70 prohibits the People's proposed amendment to the Indictment. He maintains that the omission

constitutes a fatal violation of pleading requirements as set forth in CPL §200.05. However, the Court concludes that the addition of the word “unlawfully” to Count One does not change the theory of the prosecution, nor does it prejudice the Defendant on the merits. Therefore, the Defendant’s motion to dismiss the Indictment is denied, and the People’s motion to amend the Indictment is granted.

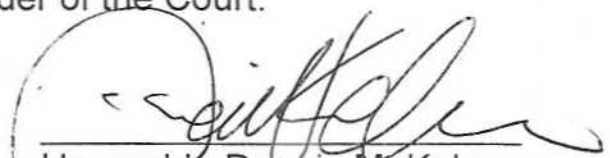
The Defendant has also argued, in regard to the two counts charging Grand Larceny in the Fourth Degree, that the evidence before the Grand Jury as to the value of the stolen property should be determined to be legally insufficient, in the absence of sworn testimony by an appraiser. It is clear from a review of the Grand Jury minutes that the only testimony regarding value was offered by the respective owners of the property that was allegedly stolen. However, the Defendant’s reliance on the decision of the Court of Appeals in *People v Lopez*, 79 NY2d 402 (1992), which he cites in support of his argument that an appraiser’s sworn testimony before the Grand Jury is necessary to establish value, is misplaced. In *Lopez*, the only proof of value before the Grand Jury was a form affidavit signed by the owner, which contained a conclusory statement as to alleged value of a vehicle, which was found by the Court to be inadequate. However, *Lopez*

does not mandate the production of sworn testimony by an appraiser. Lay testimony is admissible, provided the witness sets forth a basis of knowledge for his testimony. In the instant matter, the owners described the various items in detail, providing a sufficient basis of knowledge to support their statements as to market value of the property, at least for purposes of the Grand Jury proceeding.

Therefore, the Court finds that the evidence before the Grand Jury was legally sufficient to support each and every count of the Indictment. All other matters raised by the Defendant must await resolution at a hearing or production at time of trial.

This Decision constitutes the Order of the Court.

Dated: November 14, 2012  
Lyons, New York



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Honorable Dennis M. Kehoe  
County Court Judge