

People v Murray

2012 NY Slip Op 33849(U)

December 11, 2012

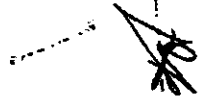
Supreme Court, Westchester County

Docket Number: 12-1281

Judge: Barbara G. Zambelli

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DEC 11 2012
MURPHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

FILED
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 ON Dec. 11 2012
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
 COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

-against-

Ind. No.: 12-1281

JOHN MURRAY and BEATRICE CAMPER,

Defendants.

ZAMBELLI, J.

The People move by notice of motion with accompanying affirmation and memorandum of law pursuant to CPL §240.40(2)(b)(v) for an order requiring defendant John Murray to permit the taking of DNA samples from his body, specifically by a buccal swab of his mouth. Defendant Murray and co-defendant Beatrice Camper have been indicted and charged with acting in concert to commit the crime of murder in the second degree as to the homicide of Camper's husband, whom, on October 3, 2012, was found dead in his taxi, having been shot in the back of his head; in addition to the murder in the second degree charge, defendant Murray alone is charged with murder in the first degree and criminal possession of a weapon in the second degree. The People submit that as part of their search of the victim's vehicle, the police took swabs of the victim's wallet, a live .25 caliber round found in the vehicle's back seat and one shell casing also found in the rear seat, the victim's cellular telephone, and also took swabs from several areas in the victim's vehicle, including six swabs from the door handles and releases therein. They

allege that on October 22, 2012, they received a request from the Westchester County Department of Laboratories and Research for buccal exemplars from both defendants, as there are "results pending" on the items of evidence that have been submitted to the lab for forensic testing. The only result that the People have received thus far was from the swab taken from the rear driver interior door handle, which revealed the presence of possible epithelial cells which matched the CODIS DNA profile of the victim's nephew, who was often in the vehicle. There are no results as yet for the remaining swabs. The People submit that upon receipt of a known buccal sample from the defendants, a DNA comparison can be made between the defendants' known DNA profiles and that of the profiles "to be generated" from the evidence recovered in the case. However, the People fail to indicate whether it has been determined that any of the remaining swabs have DNA or even have cells of the type from which DNA can be expected to be found in the first instance.

In response, the defense has submitted an affirmation in opposition and memorandum of law which alleges that the People have failed to meet their burden in demonstrating probable cause for the taking of such buccal swabs because the People failed to establish that any of the items recovered as evidence and submitted to the lab in fact contain any DNA or that any of the samples contain a profile that is unknown absent an exemplar from the defendant, whose DNA profile is already in the CODIS system. Defendant submits that the samples should first be tested to determine whether they contain any DNA and then a profile should be generated and compared to the victim and uploaded to CODIS to avoid any contamination or cross-contamination.

A Court order to obtain a DNA sample from a defendant may issue where the

People establish that (1) probable cause that defendant committed the charged crimes, (2) a "clear indication" that relevant material evidence will be found and (3) that the method used to secure it, a buccal swab, is safe and reliable (see Matter of Abe A., 56 N.Y.2d 288, 291 (1982)). Here, the People have established probable cause based upon the indictment handed down by the grand jury before whom the evidence against the defendants were presented (People v. Pryor, 14 A.D.3d 723, 725 (3d Dept. 2005); ly. denied, 6 N.Y.3d 779 (2006)). There is also no dispute herein that the proposed method to be used to secure a defendant's DNA, a buccal swab, is safe and reliable.

However, the People's application fails to meet the second prong of the Matter of Abe A. test in that they have not established that relevant material evidence will be found should defendant be ordered to provide a DNA sample. Aside from the swab which revealed epithelial cells ultimately determined to match the profile of the victim's nephew, the People have not established that there is any DNA at all on any of the other swabs taken in this case which could be compared to any sample given by the defendant, let alone that any swabs have been found to contain DNA profiles that match that of defendant which is already in the CODIS system. Accordingly, the People have failed to establish that there is a clear indication that relevant material evidence will be found via a buccal swab of defendant (see People v. Vogt, 26 Misc.3d 1222(A) (Sup. Ct. West. Co. 2010); see also Matter of Anonymous v. Cacciabaudo, 153 A.D.2d 856, 858 (2d Dept. 1989), app. dismissed, 74 N.Y.2d 890 (1989)). The motion is therefore denied with leave to renew should DNA profiles be developed from the remaining evidence in the case.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
December 11, 2012



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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