

**People v Scott**

2015 NY Slip Op 33013(U)

November 20, 2015

County Court, Westchester County

Docket Number: Indictment No. 15-0874

Judge: David F. Everett

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FILED ON  
11/23 2015  
WESTCHESTER  
COUNTY CLERK

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

PRINCE SCOTT,

FILED  
NOV 23 2015  
COUNTY OF WESTCHESTER

Defendant.

Decision and Order  
Indictment No. 15-0874

-----X  
EVERETT, J.

Defendant Prince Scott stands accused, under Indictment No. 15-0874, of five counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), five counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and five counts of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). By notice of motion dated October 28, 2015, with accompanying affirmation and memorandum of law, the defendant moves for omnibus relief. In response, the People have submitted an affirmation in opposition dated November 9, 2015, with an accompanying memorandum of law.

Without indicating which counts in the indictment they are attendant to, the People's allegations, as set forth in their bill of particulars, are as follows:

On May 28, 2015, at approximately 3:57 p.m., near 238 South Third Avenue in Mount Vernon, New York, defendant possessed and knowingly sold two clear knotted bags containing a substance alleged to be cocaine for \$40 US currency. Subsequent laboratory testing confirmed the presence of cocaine.

On May 29, 2015, at approximately 2:38 p.m., near 148 South First Avenue in Mount Vernon, New York, defendant possessed and knowingly sold three clear knotted bags containing

a substance alleged to be cocaine for \$60 US currency. Subsequent laboratory testing confirmed the presence of cocaine.

On June 23, 2015, at approximately 1:07 p.m., near 218 South Third Avenue in Mount Vernon, New York, defendant possessed and knowingly sold two clear knotted bags containing a substance alleged to be cocaine for \$40 US currency. Subsequent laboratory testing confirmed the presence of cocaine.

On July 2, 2015, at approximately 1:30 p.m., near 210 South Third Avenue in Mount Vernon, New York, defendant possessed and knowingly sold one clear knotted bag containing a substance alleged to be cocaine for \$20 US currency. Subsequent laboratory testing confirmed the presence of cocaine.

On July 7, 2015, at approximately 1:51 p.m., near 234 South Third Avenue in Mount Vernon, New York, defendant possessed and knowingly sold one clear knotted bag containing a substance alleged to be cocaine for \$20 US currency. Subsequent laboratory testing confirmed the presence of cocaine.

The bill of particulars states that an arrest warrant was issued but provides no information as to the approximate date, time and place of defendant's arrest.

On August 27, 2015, the People presented evidence of defendant's crimes to a grand jury, which returned a true bill. On September 9, 2015, the indictment was unsealed and defendant was arraigned under Indictment No. 15-0874.

Defendant's omnibus motion is resolved as follows:

A. MOTION FOR DISCOVERY AND INSPECTION/PRODUCTION OF BRADY MATERIAL

On or about September 17, 2015, the People provided defendant with consent discovery. An examination of the consent discovery fails to reveal a copy of the arrest warrant, or a bill of particulars that complies with CPL 200.95. CPL 200.95 (1) (a) requires that a bill of particulars include “items of factual information which are not recited in the indictment and which pertain to the offense[s] charged and including the substance of each defendant’s conduct encompassed by the charge which the People intend to prove at trial on their direct case.”

The bill of particulars provided by the People, with respect to the instant 15 count indictment, merely tracks the language of the Penal Law, failing to fulfil the People’s obligation to provide adequate information regarding the particulars of defendant’s alleged criminal conduct on five separate dates, and the particulars regarding the approximate date, time and place of defendant’s arrest (*People v Davis*, 41 NY2d 678, 679-680 [1977]). Additionally, while the bill of particulars references an arrest warrant, a copy of the arrest warrant is not annexed to the consent discovery provided on September 17, 2015. Accordingly, the People are directed to provide defendant with a copy of the arrest warrant and a bill of particulars that adequately informs defendant as to the time and place of his arrest in addition to the substance of his alleged criminal conduct, including, but not limited to information as to whether any or all of the alleged sales were made to an undercover police officer or to some other individual not affiliated with law enforcement,<sup>1</sup> and which, in all respects, complies with CPL 200.95, within seven (7) days of receipt of this order.

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<sup>1</sup> Disclosure of the name(s) of such individual(s) is not required at this juncture.

Furthermore, should the People, who have a continuing duty to disclose “evidence favorable to an accused” prior to trial (*see Brady v Maryland*, 373 US 83 [1963] and *Giglio v United States*, 405 US 150 [1972]), become aware of any material which is arguably favorable or exculpatory, but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its in camera inspection and determination as to whether such material will be disclosed to defendant. The People are also directed to make available to defendant any prior written or recorded statements of a witness who testifies for the prosecution, consistent with *People v Rosario* (9 NY2d 286 [1961]) and CPL Article 240. To any further extent, defendant’s motion for discovery and inspection is denied as it seeks material and/or information beyond the scope of discovery (*see People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001], *lv denied* 97 NY2d 605 [2001]); *Matter of Brown v Appleman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994], *lv denied* 83 NY2d 755 [1994]; CPL Article 240).

B. MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS AND/OR REDUCE THE INDICTMENT

Defendant moves pursuant to CPL 190.65, and CPL 210.10, 210.20, and 210.30, to dismiss the indictment, or counts thereof, on the grounds that the evidence before the grand jury was legally insufficient, was improperly presented, and that the grand jury proceeding was defective within the meaning of CPL Article 210. On consent of the People, the Court has conducted an in camera review of the minutes of the proceedings before the grand jury.

Pursuant to CPL 190.65 (1), an indictment must be supported by legally sufficient

evidence establishing that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's commission thereof (*People v Jennings*, 69 NY2d 103, 115 [1986]; CPL 70.10 [1]). "In the context of a grand jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Bello*, 92 NY2d 523, 526 [1998]). In rendering a determination, "[t]he reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt" (*People v Ackies*, 79 AD3d 1050, 1056 [2d Dept 2010] [internal citations and quotation marks omitted]).

A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged (*see* CPL 210.30 [2]). Accordingly, defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to defendant's claim that the grand jury proceeding was defective within the meaning of CPL 210.35 and CPL 210.35 (5), a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the grand jury on the law, that the requisite number of grand jurors voted to indict and had heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298, 300 [1988]; *People v Julius*, 300 AD2d 167 [1<sup>st</sup> Dept 2002], *lv denied* 99 NY2d 655 [2003]), that the grand jury was properly instructed (*see People v Valles*, 62 NY2d 36 [1984]; *People v Calbud*, 49 NY2d 389 [1980]), and that the proceeding conformed to the requirements of CPL Article 190, in that the integrity of the grand jury proceeding was not

impaired and no prejudice to the defendant resulted from the presentation.

In making this determination, the Court does not find that release of the grand jury minutes or certain portions thereof to the parties is necessary to assist the Court. In the absence of a showing of a compelling and particularized need for disclosure of the minutes of the grand jury proceeding, defendant's motion for release thereof is denied (*see People v Robinson*, 98 NY2d 755 [2002]).

C. MOTION FOR SANDOVAL/VENTIMIGLIA HEARING AS TO PRIOR CONVICTIONS, IMMORAL ACTS AND UNCHARGED CRIMES

1. *Sandoval* - defendant's motion is granted solely to the extent that a hearing, pursuant to *People v Sandoval* (34 NY2d 371, 374, 376-377 [1974]), shall be held prior to trial at which time:

a. The People must notify the defendant of all specific instances of the defendant's prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the defendant (*see* CPL 240.43); and

b. The defendant must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (*see People v Malphurs*, 111 AD2d 266 [2d Dept 1985], *lv denied* 66 NY2d 616).

2. *Ventimiglia* - The People's papers appear to indicate that they are currently unaware of any specific prior bad acts of the defendant which they intend to introduce at trial. Accordingly, the request for a hearing, pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), is denied at this time. In the event that the People subsequently determine that they will seek to introduce

such evidence, they shall so notify the Court and defense counsel, and a *Ventimiglia* hearing shall be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be used by the People to prove their case in chief (*id.*). The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia* hearing to be consolidated and held together with the other pretrial hearings

D. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant's motion to suppress all physical evidence recovered, or in the alternative, for a hearing to determine its admissibility, is denied. Defendant fails to clarify whether he is seeking suppression of physical evidence recovered prior to his arrest (the clear knotted bags alleged to contain cocaine), or any physical evidence recovered incident to his arrest. Defendant also fails to articulate a legal basis for suppression of physical evidence, or for a pretrial hearing, pursuant to *Mapp v Ohio* (367 US 643 [1961]), to determine whether any physical evidence was recovered as a direct consequence of unlawful police conduct.

Defendant's motion lacks sworn allegations of fact in support of his application, and the mere recovery of contraband from a defendant's person does not, in and of itself, present a question involving a constitutional violation (*see People v Scully*, 14 NY3d 861, 863-864 [2010]).

E. MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

The People have noticed eight identification procedures of defendant, pursuant to CPL 710.30, to wit: (1) on May 28, 2015, a witness identified defendant from a photograph at the Mount Vernon Police Department prior to 4:22 p.m.; (2) on May 28, 2015, another witness identified defendant from a photograph at the Mount Vernon Police Department prior to 4:22

p.m.; (3) on May 28, 2015, a witness identified defendant in person near the scene at approximately 3:57 p.m.; (4) on May 29, 2015, a witness identified defendant in person near the scene at approximately 2:45 p.m.; (5) on June 23, 2015, a witness identified defendant in person near the scene at approximately 1:07 p.m.; (6) on July 2, 2015, a witness identified defendant in person near the scene at approximately 1:30 p.m.; (7) on July 7, 2015, a witness identified defendant in person near the scene at approximately 1:51 p.m.; and (8) on August 27, 2015, a witness identified defendant from a photograph during the grand jury presentation at approximately 10:30 a.m.

Defendant's motion to suppress the noticed identification evidence is granted to the extent that a hearing shall be held prior to trial to determine whether any of the identification procedures were unduly suggestive or merely confirmatory (*see United States v Wade*, 388 US 218 [1967]; *People v Wharton*, 74 NY2d 921 [1989]). If, after consideration of the evidence presented during the hearing the court finds that any of the procedures were not confirmatory, then the hearing will be expanded to determine the propriety of the identification. Specifically, the court shall determine whether any of the identifications were so improperly suggestive as to taint any in-court identification. In the event any of the identification procedures are found to be unduly suggestive, the court shall go on to consider whether the People have proved, by clear and convincing evidence, that an independent source exists for such witness's proposed in-court identification.

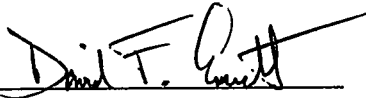
F. MOTION TO CONDUCT PRETRIAL HEARINGS PRIOR TO TRIAL

Defendant's motion to schedule pre-trial hearings prior to trial is granted to the extent that such hearings will be scheduled at a time that is convenient to the Court, upon due consideration

of all of all its other cases and obligations.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
November 20, 2015



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HON. DAVID F. EVERETT  
COUNTY COURT JUDGE

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