

<b>People v McDonald</b>
2015 NY Slip Op 33015(U)
November 18, 2015
County Court, Westchester County
Docket Number: Indictment No. 15-0685
Judge: David F. Everett
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COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

FILED ON  
November \_\_\_\_, 2015  
WESTCHESTER COUNTY  
CLERK

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DWAYNE MCDONALD,

Omnibus Decision and Order  
Indictment No. 15-0685

Defendants.

**FILED**

SEP 19 2017

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

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EVERETT, J.

Defendant Dwayne McDonald stands accused, under Indictment No. 15-0685, of three counts of robbery in the second degree while aiding, abetting and acting in concert with another (Penal Law § 160.10 [1]); three counts of grand larceny in the fourth degree while aiding, abetting and acting in concert with another (Penal Law § 155.30 [5]), and three counts of conspiracy in the fourth degree while aiding, abetting and acting in concert with another (Penal Law § 105.10 [1]). By notice of motion dated September 18, 2015, with an accompanying affirmation and memorandum of law, defendant moves for omnibus relief. In response, the People submit an affirmation in opposition dated October 9, 2015, with an accompanying memorandum of law.

The allegations, as set forth in the People's bill of particulars, are that, on or about May 25, 2015, at approximately 4:00 a.m., in the vicinity of the Aqueduct near Maple Place in the Village of Ossining, New York, defendant, together with William Bentley, who was also charged under the same indictment,<sup>1</sup> forcibly stole property from three male victims. More specifically, it is alleged that defendant, Bentley and two other unnamed accomplices, one of whom was a

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<sup>1</sup> On or about August 28, 2015, codefendant William Bentley entered a plea of guilty in full satisfaction of this indictment.

female, approached the three male victims and asked if they were interested in having sex with the female in exchange for \$200. Defendant McDonald and the accomplices then attacked the three male victims. Defendant McDonald allegedly struck victim Juan Chimbo in the back of the neck, head and shoulder area, knocked him to the ground and stole a cell phone and wallet containing, among other things, cash and credit cards from Chimbo's pockets. Bentley allegedly attacked victim Miguel Morales, stealing a wallet and cash from Morales, and the accomplices allegedly attacked victim Pablo Verdugo, punching Verdugo in the face, and stealing approximately \$80 cash from his pocket.

On May 25, 2015, at approximately 5:06 a.m. and 5:30 a.m., two of the alleged victims identified defendant McDonald from a photo array at the Ossining Village Police Department. Later that same day, at approximately 10:45 a.m., defendant McDonald was placed under arrest at 75 Croton Avenue, Ossining, New York.

The People presented evidence of defendant's crimes to a grand jury on July 9 and July 14, 2015. The grand jury voted a true bill on all nine counts on July 14, 2015. The People filed an indictment on July 28, 2015, and on August 6, 2015, defendant was arraigned under Indictment No. 15-0685.

The omnibus motion is decided as follows:

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

Defendant moves for an order dismissing the indictment, or counts thereof, on the grounds that the evidence before the grand jury was legally insufficient to establish the offense charged or any lesser included offense, that the evidence was improperly presented, and that the grand jury proceeding was defective, within the meaning of CPL 190.65, CPL 210.20 (1) (b) and

(c), 210.25, 210.30, and 210.35. 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, the defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to the defendant's claim that the grand jury proceedings were defective within the meaning of CPL 210.20 and 210.35, 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; the requisite number of grand jurors who voted to indict 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]); the grand jury was properly instructed (*see People v Valles*, 62 NY2d 36 [1984]; *People v Calbud*, 49 NY2d 389 [1980]); and 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 the release of the grand jury minutes or certain portions thereof to the parties was 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, the defendant's motion for release thereof is denied (*see People v Robinson*, 98 NY2d 755 [2002]).

B. MOTION FOR A FURTHER BILL OF PARTICULARS

The motion is denied. The bill of particulars set forth in the consent discovery order provided to defendant on or about August 27, 2015, adequately informs him of the substance of his alleged conduct in compliance with CPL 200.95.

C. MOTION FOR DISCOVERY

Defendant's motion for discovery is granted to the extent provided for in CPL Article 240. If any items set forth in CPL Article 240 have not been provided to the defendant, pursuant to the Consent Discovery Order and bill of particulars in the instant matter, said items are to be provided forthwith.

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 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 the defendant. To any further extent, the application 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]). The People shall also 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.

D. MOTION TO SUPPRESS STATEMENT EVIDENCE

The People provided notice of two statements made by defendant. The first is an oral statement made by defendant to a police officer on May 25, 2015, at approximately 10:45 a.m., at 75 Croton Avenue, Ossining, and the second is a videotaped statement made to a detective at approximately 11:30 a.m. that same day, at the Ossining Village Police Department. Defendant seeks suppression of both noticed statements, or in the alternative, for a hearing to determine the admissibility of the extrajudicial statements reportedly made by defendant (*see People v Huntley*, 15 NY2d 71 [1965]).

Defendant's motion to suppress the noticed statements is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether either of the statements allegedly made by defendant, which have been noticed by the People, pursuant to CPL 710.30, was involuntarily made within the meaning of CPL 60.45 (*see* CPL 710.20 [3]; CPL 710.60 [3] [b];

*People v Weaver*, 49 NY2d 1012 [1980]), and/or was obtained in violation of his Fourth and/or Sixth Amendment rights (*Dunaway v New York*, 442 US 200 [1979]).

E. MOTION TO SUPPRESS IDENTIFICATION EVIDENCE<sup>2</sup>

In the interest of justice, defendant's motion is granted to the extent that a hearing shall be held prior to trial to determine whether the identification procedure noticed by the People pursuant to CPL 710.30, was 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 the procedure was not confirmatory, then the hearing will be expanded to determine the propriety of such identification. Specifically, the Court shall determine whether the identification procedure utilized was so improperly suggestive as to taint any in-court identification. In the event it is found to have been unduly suggestive, the Court shall go on to consider whether the People have proven, by clear and convincing evidence, that an independent source exists for such witness's proposed in-court identification.

F. MOTION TO PRECLUDE UNNOTICED STATEMENT OR IDENTIFICATION EVIDENCE AT TIME OF TRIAL

Defendant's motion to preclude the People from introducing any unnoticed statement or identification evidence at trial is denied without prejudice should the People seek to introduce such evidence at trial.

G. SANDOVAL/VENTIMIGLIA HEARING

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<sup>2</sup> In reply to the People's affidavit in opposition, in which the People note that they had provided CPL 710.30 notice of their intent to offer identification evidence at time of trial, defendant moved to suppress such identification evidence.

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 with the other hearings herein.

H. MOTION TO CONDUCT PRETRIAL HEARINGS PRIOR TO TRIAL

Defendant's motion to schedule pretrial 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 its other cases and obligations.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
November 18, 2015



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HON. DAVID F. EVERETT, J.C.C.

TO:

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