

**Matter of Bruce**

2016 NY Slip Op 32716(U)

December 1, 2016

County Court, Westchester County

Docket Number: 16-0878-01

Judge: Barbara G. Zambelli

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FILED

DEC 02 2016

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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IN THE MATTER OF THE APPLICATION TO  
REQUIRE **FLOYD BRUCE** TO PERMIT THE  
TAKING OF DNA SAMPLES FROM HIS BODY.

DECISION & ORDER

Ind. No.:16-0878-01

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ZAMBELLI, J.

The People move by Order to Show Cause with accompanying affirmation and memorandum of law pursuant to CPL §240.40(2)(b)(v) for an order requiring defendant Floyd Bruce to permit the taking of DNA samples from his body, specifically by a buccal swab of his mouth.

Defendant has been indicted and charged with the crimes of attempted murder in the second degree, attempted assault in the first degree, assault in the second degree (2 counts), criminal possession of a weapon in the second degree and reckless endangerment in the first degree allegedly committed on or about July 16, 2016 in the County of Westchester; for robbery in the first degree (2 counts) and robbery in the second degree allegedly committed on or about July 26, 2016 in the County of Westchester, and for criminal possession of a weapon in the second degree and criminal possession of marijuana in the fifth degree allegedly committed on or about July 27, 2016 in the County of Westchester.

As to the crimes committed on July 16, 2016, defendant is accused of firing a handgun at a group of young men, and shooting a four year old girl who was walking on

the street nearby. Upon defendant's arrest on July 27, 2016, a loaded .22 caliber semi automatic pistol was recovered from his person. Subsequent ballistics testing revealed that the handgun recovered from the defendant on July 27 matched the shell casings recovered from the scene of the July 16 shooting, which shooting was also captured on surveillance video. The People further contend that the victim of the July 26 robbery identified the handgun recovered from defendant on July 27 as appearing to be the same weapon used by defendant's co-defendant in the July 26 robbery.

Swabbings of the handgun recovered from defendant, which included swabbings of the grip and trigger, were taken by the police and submitted to the Westchester County Department of Laboratories and Research. On November 7, 2016, the People learned that a partial single source DNA profile was developed from the swabbings and were advised by a forensic scientist that comparison to an exemplar is possible.

On August 22, 2016 an indictment was filed charging defendant with the above listed crimes. By Decision and Order of this Court (Zambelli, J.) filed and entered on November 21, 2016, this Court held, inter alia, that the indictment against defendant was legally sufficient.

The People seek an order to require the defendant to permit the taking of buccal cell samples from his body. The defendant opposes the application on the grounds the people have failed to establish probable cause for the necessity of the taking of the DNA sample because the People allegedly already have defendant's DNA profile in CODIS but failed to compare it to the profile developed from the swabbings. He also submits that comparing the swab to the CODIS sample is more safe and effective than taking one from defendant.

Defendant further argues that CPL §240.40(2) is unconstitutional and violative of defendant's state and federal due process rights. Should the Court order that the buccal swab be taken, defendant requests that he be able to do the swabbing himself, should he so elect, and that defense counsel be consulted and given notice as to when the procedure will be performed so that he may be present therefor.

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 defendant was presented (People v. Pryor, 14 A.D.3d 723, 725 (3d Dept. 2005); lv. denied, 6 N.Y.3d 779 (2006)) and this Court's review of the grand jury minutes found the indictment to be legally sufficient. 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.


That there may be a sample in the CODIS database does not preclude the taking of another sample for defendant. Indeed, it is important that another sample of defendant's DNA be taken via buccal swab in order to confirm beyond a reasonable doubt the match between defendant's DNA and the swabbings from the handgun. Additionally, there is no merit to the defendant's contention that CPL §240.40(2) is unconstitutional (see

Matter of Brown v. Grosso, 285 A.D.2d 642, 643-44 (2d Dept. 2001), lv. denied, 95 N.Y.2d 605 (2001)).

Accordingly the People's application is granted. The proposed order has been signed; however, the People are further directed to schedule the taking of the swab at the mutual convenience of all parties concerned, so that counsel may be present when the procedure is performed.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York  
December 1, 2016

  
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BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

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