

**People v Shabazz**

2016 NY Slip Op 33066(U)

June 10, 2016

County Court, Broome County

Docket Number: 16-97

Judge: Kevin P. Dooley

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STATE OF NEW YORK  
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

SALIH R. SHABAZZ,  
Defendant.

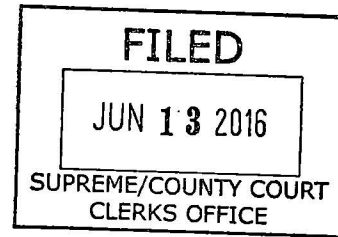
**KEVIN P. DOOLEY, J.**

On April 28, 2016, the above-named defendant filed with the Court an Omnibus Motion seeking certain Orders and relief in connection with the indictment filed against him. The defendant was indicted along with his co-defendant Nancy Lockwood on March 4, 2016, and charged with three counts of Criminal Possession of a Controlled Substance in the Third Degree, and two counts of Criminally Using Drug Paraphernalia. The People's response to the Omnibus Motion was filed on May 27, 2016. The following constitutes the Decision and Order of the Court for those motions.

#### GRAND JURY MOTIONS

The defendant moves for an Order, pursuant to CPL 210.30, for inspection of the stenographic minutes of the grand jury proceeding for the purpose of determining whether the evidence before the grand jury was legally sufficient to support the charges contained in the indictment. The People have no objection to the Court examining the grand jury minutes for this purpose and provided a copy of the same for the Court's review on June 3, 2016. Upon examination of the minutes, the Court finds that release of the minutes to the defense is not necessary to assist the Court in making its determination of the motion. Accordingly, the defendant's request for release of the grand jury minutes is denied.

In reviewing the legal sufficiency of the evidence presented, the Court must view the evidence in a light most favorable to the People and determine whether the evidence, if unexplained or uncontradicted, would be sufficient to support a guilty verdict after trial. The Court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, provide proof of every element of the crimes charged and the defendant's commission of those crimes. Its inquiry does not include weighing the proof or examining its



**DECISION AND ORDER**  
(Indictment #16-97)

adequacy, or determining whether there was reasonable cause to believe the accused committed the crimes charged, as the resolution of such questions is exclusively the province of the Grand Jury. *People v. Jensen*, 86 NY2d 248 (1995).

In this case, the charges the grand jury was asked to consider included three counts of Criminal Possession of a Controlled Substance in the Third Degree, alleging the defendants' unlawful possession of two separate quantities of heroin and one quantity of cocaine, each count alleging that the drugs were possessed with intent to sell. Two detectives assigned to the Broome County Special Investigations Task Force testified before the grand jury concerning the February 26, 2016 execution of a search warrant at a second floor apartment at 211 Harrison Street in Johnson City. During the execution of the warrant, the detectives testified that they located co-defendant Nancy Lockwood inside the apartment adjacent to the living room, where they found two boxes of glassine or waxine envelopes, a scale, a plastic bag containing rubber bands, bags containing heroin bundled together with a rubber band, and an additional nine bags containing heroin along with a bag with a straw in it laying on the floor. The detectives also said they found two safes in the kitchen, which were opened with the co-defendant's assistance. Inside one safe was money and a small amount of crack cocaine; in the other safe was money and eighteen bundles of heroin. Each bundle contained 10 packets of heroin.

During their testimony, each detective was asked to describe his training and experience in narcotics investigations and to explain the significance of the various items of evidence found. Such testimony is permissible to educate grand jurors, who might not have the "day-to-day experience, common observation and knowledge" of narcotics use and trafficking to understand the evidence. In addition, both detectives expressed their opinion that the quantity of the controlled substances, the packaging materials and scale and the money found was indicative of the sale of narcotics rather than personal use. *People v. Hicks*, 2 NY3d 750 (2004); *People v. Blackman*, 118 AD3d 1148 (3d Dept., 2014); *People v. Berry*, 5 AD3d 866 (3d Dept., 2004).

The prosecutor also asked the detectives if they had an opinion concerning whether the drugs were possessed by the defendants for personal use or with the intent to sell, and each detective expressed his opinion that the drugs were possessed by the defendants with the intent to sell. The elicitation of such opinion testimony, which was directed at the ultimate issue of whether the defendants possessed the requisite intent to sell, was clearly improper. The grand jurors were capable of determining for themselves whether the defendants had the intent to sell

the narcotics found in their apartment by drawing the logical inferences from evidence presented, including the testimony provided by the detectives, based on their training and experience, concerning the significance of that evidence. Therefore, it was unnecessary and improper to elicit the opinion of the detectives concerning the defendants' intent and such testimony usurped the fact-finding function of the grand jury. *People v. Berry, supra; People v. Ingram, 2 AD3d 211 (1st Dept., 2003); People v. Wright, 283 AD2d 712 (3d Dept., 2001)*.

Dismissal of an indictment because the integrity of the proceedings was impaired and the defendant possibly prejudiced by improper conduct during the presentation is "a drastic remedy and will be granted only in exceptional circumstances." *People v. Huston, 88 NY2d 400, 409 (1996)*. Not every improper comment, introduction of inadmissible testimony, impermissible question or mere mistake renders an indictment defective and the submission of some inadmissible evidence will be deemed fatal to an indictment only when the remaining evidence is insufficient to sustain the indictment. However, the legal sufficiency of the evidence supporting an indictment, standing alone, will not automatically immunize an indictment from dismissal if the reviewing court finds that impermissible, improper or prejudicial conduct has occurred during the presentation. *People v. Thompson, 22 NY3d 687 (2014)*.

Here, aside from eliciting the improper opinion testimony of the detectives, there was no deliberate misconduct on the part of prosecutor, and the other evidence presented to the grand jury, including the defendant's oral admissions, was legally sufficient to establish the commission by the defendant of three counts of Criminal Possession of a Controlled Substance in the Third Degree as well as two counts of Criminally Using Drug Paraphernalia in the Second Degree, or lesser included offenses thereof. Therefore, the defendant's motion to dismiss the indictment is denied.

#### **MOTIONS FOR DISCOVERY AND OTHER PRE-TRIAL DISCLOSURES**

As part of his Omnibus Motion, the defendant moves for discovery and states that a Discovery Demand was attached to his affidavit. The chambers copy of the defendant's motion did not include that attachment. However, the prosecutor has responded to the defendant's motion by disclosing those items of property enumerated in Criminal Procedure Law Section 240.20 and also stating that copies of the police and witness statements and a CD containing

photographs of the crime scene and evidence seized pursuant to a search warrant were provided to the defendant on March 30, 2016. The prosecutor also states that he will make the evidence seized pursuant to a search warrant available for inspection and will provide reports concerning the testing of the presumptive narcotics seized from the defendant's residence pursuant a search warrant upon his receipt of the same.

The defendant also moves for Orders requiring the prosecution to furnish a Bill of Particulars, disclose any and all exculpatory *Brady* material and requests that any and all prior statements of its witnesses be provided at least one week before the start of trial. In response, the prosecutor has provided those items of factual information he believes are required to be provided under CPL 200.95, states he has provided any potentially favorable information of which he is aware and states he will provide to the defendant all written or recorded statements, including any grand jury testimony, of any persons he intends to call as witnesses at trial after the jury is sworn and prior to opening statements.

If the defendant believes he has not received discovery materials to which he is entitled, he can move for an Order to compel specific disclosure, preclude evidence or other applicable relief.

#### **REQUESTS AND MOTIONS FOR PRE-TRIAL HEARINGS**

*Request for Sandoval/Ventimiglia Hearing:* The defendant requests that the Court conduct a pre-trial hearing to determine the admissibility at trial, either in the People's direct case or for the purpose of cross-examination, of the defendant's prior criminal convictions and/or uncharged criminal conduct. In response, the prosecutor indicates he did not intends to offer any *Molineaux* evidence in the People's case-in-chief and has no objection to the Court conducting a *Sandoval* hearing. Therefore, a *Sandoval* hearing will be conducted on June 24, 2016 at 2:30 p.m.

*Motions for Preclusion and Suppression Orders:* The defendant moves for an Order precluding any statements and identification evidence for which notice under CPL 710.30 was not given within fifteen days of his arraignment on the indictment. The prosecutor states that at defendant's arraignment on the indictment on March 9, 2016, the defendant was served with a Pre-Trial Notice advising the defendant of the People's intent to offer at trial the oral statements of the defendant, the sum and substance of which were contained in the report of Patrolman

James Conrad that was attached to the Notice. In addition, the prosecutor states that no identification procedures were conducted in this case.

The defendant moves for an Order suppressing all statements attributed to him that were made to law enforcement officers on the grounds the statements were involuntarily made. In response, the prosecutor states that he has no objection to the Court conducting a *Huntley* hearing. Therefore, a pre-trial hearing will be conducted on June 24, 2016 at 2:30 p.m. to determine whether any statements and admissions of the defendant exist for which timely notice was not given, and whether any of the defendant's statements and admissions for which timely notice was provided were obtained in violation of his constitutional rights.

The defendant also moves for an Order suppressing the physical evidence seized by law enforcement officers. He claims he was arrested without probable cause and any physical evidence seized was obtained in violation of his constitutional rights. The prosecutor denies that the defendant was arrested without probable cause or that the physical evidence was improperly seized. He states that the defendant was arrested pursuant to a warrant issued by the Otsego County Court and all physical evidence was seized pursuant to a search warrant issued by Broome County Court.

Criminal Procedure Law Section 710.60 provides that a motion to suppress physical evidence must state the ground or grounds for the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. In his Affirmation in support of his Omnibus motion, the defense attorney has failed to state the evidence he seeks to have suppressed or any ground or grounds for its suppression even though the prosecutor provided the defendant, through voluntary disclosure, copies of the police report and witness statements on March 30, 2016. Through those reports, the defendant would have been in possession of sufficient facts to determine what grounds, if any, he had to move for relief and what allegations of fact could be made in support of those grounds. Therefore, his motion for *Mapp*, *Darden*, *Dunaway* and/or *Alfinito* hearings to suppress the physical evidence seized is summarily denied. *People v. Mendoza*, 82 NY2d 415, 426 (1993).

#### **MOTION TO PRESERVE EVIDENCE**

The defendant moves for an Order directing the preservation of all evidence in this case, "including but not limited to any and all blood evidence, DNA samples, DNA testing kit(s), ballistics evidence, gunshot residue and/or trace evidence of any kind." The prosecutor did not

responded to this motion; however, it appears that the evidence seized consists of narcotics, packaging materials, scales and money.

There is no provision in the Criminal Procedure Law requiring the prosecution to preserve evidence, although CPL 240.20 does require the People to disclose and make available for inspection, photographing, copying or testing certain types or property. In the event any evidence is consumed during testing or otherwise destroyed or lost, the rights of the defendant are adequately protected because he has the right to discovery, disclosure of "Rosario" material, and to cross-examine witnesses concerning the handling and testing of evidence. He can also move to preclude evidence, or seek other applicable relief and/or to make appropriate arguments to the jury as to the weight of any evidence that is not properly preserved. Therefore, the motion for an Order directing the prosecution to preserve evidence is denied.

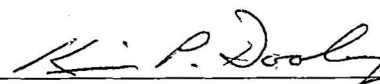
#### **MOTION FOR FURTHER RELIEF**

Criminal Procedure Law Section 255.20 provides that absent a showing of good cause, all pre-trial motions must be filed at the same time and within 45 days of arraignment. Therefore, good cause must be established before the Court will consider granting the defense leave to renew or make further motions.

The above constitutes the Decision and Order of Court.

It is so Ordered.

Dated: June 10, 2016  
Binghamton, New York

  
HON. KEVIN P. DOOLEY  
Broome County Court Judge