

People v Rodriguez

2016 NY Slip Op 33238(U)

July 13, 2016

County Court, Westchester County

Docket Number: Ind. No. 15-0707-01

Judge: Barbara G. Zambelli

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This opinion is uncorrected and not selected for official publication.

FILED
AND
ENTERED

ON _____ 20__

WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

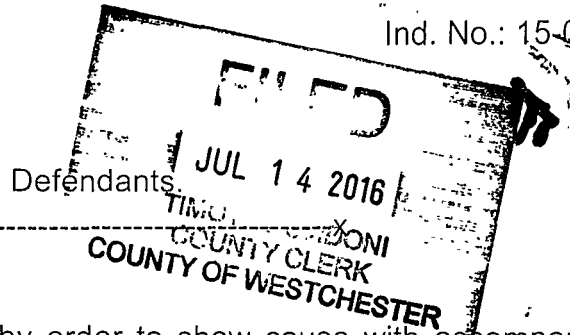
-against-

Ind. No.: 15-0707-01

EDGAR RODRIGUEZ,

Defendants,

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 Edgar Rodriguez 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 six counts of burglary in the second degree, attempted burglary in the second degree, grand larceny in the third degree, grand larceny in the fourth degree, criminal possession of stolen property in the third degree, seven counts of criminal possession of stolen property in the fifth degree, criminal impersonation, and possession of burglar tools, which charges relate to burglaries of multiple homes which occurred in April, 2015.

The People submit that on April 13, 2015, defendant and an accomplice burglarized the residence of 9 Barnes Road, Ossining, New York, and stole multiple items of personal property and jewelry. The People allege that after the burglary, defendant and the accomplice drove to the Trump National Golf Course and were observed by a security guard dumping items taken from 9 Barnes Road into a pond, and the guard observed that

the larger of the two males was smoking a cigarette, which cigarette he discarded before he and the other individual left in a white Toyota Corolla. The People allege that the security guard called the police and pointed out the discarded cigarette which the police secured as evidence. The People submit that the cigarette butt was submitted to the Westchester County Department of Laboratories and Research for DNA testing and that a DNA profile developed from the cigarette butt was submitted into the CODIS system on May 27, 2015. They argue that on June 4, 2015, the lab received a CODIS "hit" from the State DNA Index System which indicated that the DNA profile from the cigarette butt matched a specimen in the CODIS system from an individual with the same name and identifying characteristics as the defendant. The People submit that upon receipt of a known buccal sample from the defendant, a DNA comparison can be made between the defendant's known DNA profiles and that of the profile generated from the evidence recovered in the case.

In response, the defense has submitted an affirmation in opposition and memorandum of law which opposes the application on the grounds that it is untimely pursuant to CPL §240.90(1), as it was made more than 45 days after defendant's January 15, 2016 arraignment, and because he submits that the People have failed to indicate good cause for bringing a late motion.

While the People did not specifically address good cause for their motion, the facts as set forth in their motion papers demonstrate good cause in that the motion could not have been made within the 45 day statutory period, in that the CODIS "hit" did not occur until June 4, 2016.

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); lv. denied, 6 N.Y.3d 779 (2006)). There is also a clear indication that relevant and material evidence will be found, as such a sample will determine whether a match exists between the DNA found from the discarded cigarette butt and defendant's DNA. Lastly, 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.

Accordingly, it is hereby ORDERED, that **Edgar Rodríguez** permit the taking of buccal cell samples from his body, and it is further

ORDERED, that the samples be taken by an investigator with the Office of the Westchester District Attorney or a member of the Westchester County Department of Public Safety at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York or the Westchester County Jail, Valhalla, New York in a manner consistent with acceptable medical procedure; that is, by using the minimally intrusive method of a buccal swabbing of the defendant's mouth. The procedure entails using a Q-Tip type swab and quickly removing a swab of the defendant's saliva and/or cheek cells from inside of his mouth; and it is further

ORDERED, that the samples be immediately turned over to a representative of the Office of the District Attorney or a member of the Westchester County Department of

Public Safety for transport to the Westchester County Department of Laboratories and Research.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
July 13 2016



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

Hon. James McCarty
Acting District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
Attn: Daniel Fletcha, Esq.
Assistant District Attorney

Jessica Hugel, Esq.
Attorney for Defendant
1015 Park Street
Peekskill, New York 10566

Nancy Barry, Esq.
Chief Clerk