

<b>Matter of Yancey</b>
2017 NY Slip Op 32939(U)
February 15, 2017
County Court, Westchester County
Docket Number: 16-0530
Judge: Barbara G. Zambelli
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FEB 15 2017

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 **HASAN YANCEY** TO PERMIT THE  
TAKING OF DNA SAMPLES FROM HIS BODY.

DECISION & ORDER

Ind. No.:16-0530

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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 Hasan Yancey 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 robbery in the first degree allegedly committed on or about January 31, 2016 in the County of Westchester; robbery in the first degree (2 counts) and criminal possession of a weapon in the third degree allegedly committed on or about April 16, 2016 in the County of Westchester, and robbery in the first degree, robbery in the second degree, assault in the second degree (2 counts), and criminal possession of a weapon in the third degree allegedly committed on or about April 21, 2016 in the County of Westchester.

As to the crimes committed on April 21, 2016, defendant is accused of robbing and assaulting a cab driver with a knife, and the People allege that during the crime, the victim struggled with defendant over the knife and his hands were cut and bleeding. The People submit that when the police arrived at the scene, the victim gave a description of

defendant, which description included that the defendant was wearing a black sweatshirt. The police canvassed the area and located a bloody knife in a trashcan about half a block away from the crime scene, and also recovered a black sweatshirt with apparent blood on it. The People submit that the knife and sweatshirt were taken to the Westchester Department of Laboratories and Research for testing and that on October 6, 2016, a DNA profile developed from a stain on the sweatshirt was entered into the CODIS database, and that subsequent thereto, the People learned that the profile submitted to CODIS matched the DNA profile developed from defendant's convicted offender sample.

While defendant's case was pending in Yonkers City Court, by Order to Show Cause dated June 22, 2016 the People moved in that Court for the same relief sought by this application - that defendant be compelled to permit the taking of DNA samples from his body via buccal swab. By Decision and Order dated July 5, 2016, that Court (Inlaw, J.) denied the motion on the grounds that the application was made pre-indictment and no felony hearing had been conducted, that the application failed to state what prior testing had been done on the sweatshirt or knife to determine whether the blood belonged to the victim or someone else and that defendant already had a sample in the CODIS system (People's Exhibit 1). Subsequent to Judge Inlaw's ruling, the above referenced DNA testing occurred and on December 1, 2016, an indictment was filed charging defendant with the above listed crimes.

The People move again in this Court to 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)). 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.

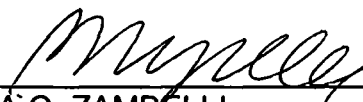
That there may be a sample in the CODIS database does not preclude the taking of another sample for defendant. Indeed, it is important that another sample of defendant's DNA be taken via buccal swab in order to confirm beyond a reasonable doubt the match between defendant's DNA and the swabbings from the sweatshirt. 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  
February 15, 2017

  
BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

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