

**People v Rosario**

2017 NY Slip Op 32989(U)

February 27, 2017

County Court, Westchester County

Docket Number: 16-1115


Judge: Barbara G. Zambelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

**FILED** 

**DECISION & ORDER**

- against -

**FEB 27 2017**

**Indictment No.: 16-1115**

DEURY ROSARIO,

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

Defendant.

**ZAMBELLI, J.**

The defendant has been indicted for attempted assault in the first degree (Penal Law §§110, 120.10), two counts of criminal possession of a weapon in the second degree (Penal Law §§265.03(1)(b),(3)), reckless endangerment in the first degree (Penal Law § 120.25), menacing in the second degree (Penal Law §120.14(1)), and obstructing governmental administration in the second degree (Penal Law §195.05). Defendant is charged with allegedly committing these crimes on August 26, 2016, in Yonkers, New York. He now moves by notice of motion with supporting affirmation for omnibus relief. The People's response consists of an affirmation in opposition and a memorandum of law. Upon consideration of these papers, as well as review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

**1. MOTION FOR DISCOVERY AND INSPECTION / BRADY / ROSARIO**

This application is granted to the limited extent of ordering that the People are to provide the defendant with materials and information, the disclosure of which is required

pursuant to the provisions of CPL §240.44 and §240.45. As to the defendant's demand for exculpatory material, the People have indicated their awareness of their continuing obligation to disclose any such material immediately upon its discovery. Where a question exists as to whether a particular item should be disclosed, they are directed to submit the material or information to the Court, which will conduct an in camera examination to resolve the issue. The demand for witness statements is denied as premature. The People recognize their duty to comply with People v. Rosario, 9 N.Y.2d 286; CPL §240.44, §240.45.

The defendant's demand for disclosure of items or information to which he is entitled pursuant to the provisions of CPL §240.20(1) (a) through (l) is granted upon the People's consent. The application is otherwise denied as it seeks items or information which are beyond the scope of discovery and the defendant has failed to show that such items are material to the preparation of his defense (CPL §240.40 [1][a]).

## **2. MOTION TO SUPPRESS PHYSICAL EVIDENCE/ PROBABLE CAUSE**

Defendant contends that all tangible evidence recovered as the result of the arrest must be suppressed because it was obtained as a result of his arrest without probable cause and in violation of his Fourth, Fifth, Sixth and Fourteenth constitutional amendment rights.

Defendant's motion for suppression of physical evidence or for a Dunaway/ Mapp hearing is denied because no sworn allegations of fact whatsoever are set forth in support of the conclusory statement of illegal arrest. Despite having sufficient information regarding the "factual predicate" for the arrest, defendant failed to dispute the factual allegations

herein and merely alleged that the arrest was illegal. Defendant's conclusory allegations do not warrant a hearing and, accordingly, the motion on this ground is summarily denied (see, People v. Mendoza, 82 N.Y.2d 415; People v. France, 12 N.Y.3d 790; People v. Jones, 95 N.Y.2d 721; People v. Kemp, 262 A.D.2d 333; People v. Anderson, 253 A.D.2d 636; People v. Sully, 14 N.Y.3d 861). Similarly, to the extent that defendant's motion to suppress tangible evidence is based on Fifth and Sixth amendment grounds it is also denied as, having made no statements in this case, defendant's Fifth and Sixth amendment rights have no bearing on the admissibility of the evidence gathered as a result of defendant's arrest and, therefore, defendant fails to set forth any allegations that support said claims.

### **3. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)**

Granted on consent of the People to the extent that this Court directs that a hearing be held immediately prior to trial. Prior to the commencement of jury selection, the People will disclose to defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes (CPL §240.43). Defendant must then sustain his burden of informing the Court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf (People v. Matthews, 68 N.Y.2d 118, 121-122). In the event that the People seek to introduce the defendant's prior bad acts on their direct case, the burden is on the People to seek a Ventimiglia hearing to determine the admissibility of such evidence (People v. Ventimiglia, 52 N.Y.2d 350; People v. Molineux, 168 N.Y. 264).

#### **4. MOTION TO DISMISS FACIALLY INSUFFICIENT INDICTMENT**

This motion is denied. The form and content of the indictment satisfy the requirements of CPL §200.50, and are sufficient to inform the defendant of the charges against him so as to enable him to prepare a defense (see, People v. Iannone, 45 N.Y.2d 589; People v. McKinney, 138 A.D.3d 604).

#### **5. MOTION TO INSPECT/DISMISS/REDUCE**

This application is granted to the extent that the Court has conducted an in camera inspection of the minutes of the grand jury proceedings. Upon review of the evidence presented, this Court finds that all counts were supported by sufficient evidence and that the instructions given were appropriate. There was no other infirmity which would warrant a dismissal of the indictment. Accordingly, that branch of the motion which seeks dismissal of the indictment is denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (CPL §210.30[3]).

#### **6. MOTION TO STRIKE ALIBI DEMAND**

This motion is denied. There is no merit to defendant's contention that CPL §250.20 is unconstitutional (see, People v. Dawson, 185 A.D.2d 854; People v. Cruz, 176 A.D.2d 751; People v. Gill, 164 A.D.2d 867; People v. Peterson, 96 A.D.2d 871).

#### **7. MOTION TO STRIKE SCANDALOUS MATTER**

The defendant's motion to strike allegedly prejudicial language from the indictment is denied. The phrase "against the peace and dignity of the People of the State of New York" merely identifies the defendant's alleged acts as public, rather than private wrong (People v. Winters, 194 A.D.2d 703; People v. Gill, 164 A.D.2d 867).

## **8. MOTION TO PRECLUDE IDENTIFICATION/WADE**

The People served and filed Notices of Identification pursuant to CPL §710.30.

According to the People, at 2:50 a.m. on August 26, 2016, defendant exchanged words with another patron at a bar in Yonkers, N.Y. Defendant then pushed the other patron, at which time a bouncer asked defendant to leave the premises. Defendant refused, the People allege, and the bouncer attempted to physically remove defendant from the premises. As the bouncer tried to force defendant out of the door, the bouncer heard a loud bang that he recognized as a gunshot. The bouncer saw a gun in defendant's hand and grabbed the hand. The two men fell to the floor. Defendant, according to the People, fired two more shots during the struggle. No one was injured by the three shots.

According to the People, an off-duty police officer at the bar drew his own gun and ordered defendant to drop his weapon. Defendant was asked multiple times to let go of the gun. Defendant eventually released the weapon and the altercation continued after the officer recovered the gun and placed it in his pocket.

At this time two plain clothed police officers arrived at the scene. The off-duty officer instructed them to arrest defendant as the person who fired the relevant shots. Another witness also identified defendant as the one who should be arrested. Defendant was immediately arrested and transported to Yonkers Police Department. The two on-scene identifications were noticed by the People pursuant to CPL §710.30

Defendant now moves to suppress the noticed identifications on the grounds that the identifications were the result of unduly suggestive procedures and the fruit of the

poisonous tree of his illegal arrest.

The People oppose the motion on Fourth Amendment grounds and argue it should be summarily denied for failure to allege facts in support thereof, as set forth above. As to the identifications, the People argue that the identifications were not the type contemplated in CPL §710.30 because there were no police arranged confrontations and the identifications were spontaneous. In any event, the People argue, the identifications, subsequent to the crime, were not unduly suggestive as they were spontaneous and, even if the police asked “Where is he,” this is a reasonable, non-suggestive question and not an identification procedure. Finally, even if the identifications were unduly suggestive, the People assert, the witnesses had an independent basis from which to identify defendant based on their personal observation of the defendant during the crime (People v. Cotto, 268 A.D.2d 441).


Defendant’s motion is granted to the extent that a hearing shall be held immediately before trial to determine whether police identification procedures were employed, and if so, whether they were unduly suggestive, and, if so, whether any independent sources exist for in-court identification by the witnesses (People v. Pacquette, 17 N.Y.3d 87; People v. McLemore, 264 A.D.2d 858).

However, such hearing should not address defendant’s allegation that his identification was the fruit of the poisonous tree of an illegal arrest, as no sworn allegations of fact are set forth in support of his conclusory statement that the police lacked probable cause for his arrest. As noted above, despite having sufficient information regarding the “factual predicate” for the arrest, defendant failed to dispute the factual allegations herein and merely alleges that the police lacked probable cause for his arrest. Accordingly, his

motion on this ground is summarily denied (see, People v. Mendoza, supra; People v. France, supra; People v. Jones, supra; People v. Kemp, supra).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York  
February 27, 2017

  
\_\_\_\_\_  
BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

Hon. Anthony Scarpino, Esq.  
District Attorney, Westchester County  
Westchester County Courthouse  
111 Dr. Martin Luther King Jr. Blvd.  
White Plains, New York 10601  
Attn: Heide Mason, Esq.  
Assistant District Attorney

Clare J. Degnan, Esq.  
The Legal Aid Society of Westchester County  
150 Grand Street, Suite 100  
White Plains, NY 10601  
Attn: Nicholas Speranza, Esq.

Nancy Barry, Esq.  
Chief Clerk