

**People v White**

2017 NY Slip Op 33183(U)

October 13, 2017

County Court, Dutchess County

Docket Number: 9/2017

Judge: Peter M. Forman

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1319-2017

STATE OF NEW YORK: COUNTY OF DUTCHESS  
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

JOHNNY WHITE, JR, and  
JAYDA KEARNEY

Defendants.

DECISION AND ORDER

Indictment No. 9/2017

William V. Grady,  
District Attorney  
Frank R. Petramale, Esq.

Thomas K. Petro, Esq.  
Counsel for Defendant

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HON. PETER M. FORMAN, County Court Judge

The following papers were read and considered in deciding this motion:

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Defendants stands accused by the Grand Jury of the County of Dutchess of one count of Robbery in the First Degree, a Class B Armed Violent Felony, in violation of §160.15(3) of the Penal Law; and one count of Grand Larceny in the Third Degree, a Class D Felony, in violation of §155.35(1) of the Penal Law.

By Omnibus Motion, Defendant seeks various forms of relief, which the Court addresses as follows.

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## LEGAL SUFFICIENCY OF THE INDICTMENT

With respect to Defendant's motion for inspection of the Grand Jury minutes and dismissal or reduction of the indictment, the same is granted to the extent that the Court has reviewed such minutes for the purpose of determining Defendant's motion to dismiss or reduce the charges to a lesser included offense upon the grounds that said inspection would allegedly show that the evidence upon which the indictment was based was legally incompetent, insufficiently corroborated or otherwise inadmissible. [CPL §190.65(1)]. In assessing the legal sufficiency of the evidence, it is noted that the applicable standard of review is proof of a *prima facie* case, not proof beyond a reasonable doubt. [*People v. Gordon*, 88 N.Y.2d 92 (1996)].

"In the context of a motion to dismiss an indictment, the sufficiency of the People's presentation 'is properly determined by inquiring whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury.'" [*People v. Galatro*, 84 N.Y.2d 160, 163 (1994), quoting *People v. Jennings*, 69 N.Y.2d 103, 114 (1986)]. "The People are required to make out a *prima facie* case that the accused committed the crime charged by presenting legally sufficient evidence establishing all of the elements of the crime." [*Id.* at 164]. "The inquiry of the reviewing court is limited to ascertaining the 'legal sufficiency' of the evidence, and does not include weighing the proof or examining its adequacy at the grand jury stage." [*People v. Jensen*, 86 N.Y.2d 248, 252 (1995)]. CPL §70.10 defines "legally sufficient evidence" as 'competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof.'

Having examined the minutes of the testimony before the Grand Jury of Dutchess County, this Court determines that, viewing this evidence in the light most favorable to the People, the indictment is based upon evidence which is legally sufficient to establish that

Defendant committed the offense as set forth therein and competent and admissible evidence before the Grand Jury provides reasonable cause to believe that Defendant committed that offense [CPL §190.65; *People v. Jensen*, 86 NY2d 248 (1995); *People v. Jennings*, 69 N.Y.2d 103 (1986); *People v. Swamp*, 84 N.Y.2d 725(1994); *People v. Haney*, 30 N.Y.2d 328 (1972)].

#### GRAND JURY PROCEEDINGS

“A grand jury proceeding is defective warranting dismissal of the indictment [pursuant to CPL 210.35(5)] only where the proceeding fails to conform with the requirements of CPL article 190 to such degree that the integrity thereof is impaired and prejudice to the defendant may result.” [*People v. Burch*, 108 A.D.3d 679, 680 (2d Dept. 2013). See also *People v. Moffitt*, 20 A.D.3d 687, 688 (3d Dept. 2005)]. “The exceptional remedy of dismissal under CPL 210.35(5) should be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury.” [*People v. Miles*, 76 A.D.3d 645, 645 (2 Dept. 2010), quoting *People v. Huston*, 88 N.Y.2d 400, 409 (1996). See also *People v. Reed*, 71 A.D.3d 1167, 1168 (2d Dept. 2010); *People v. Ramirez*, 298 A.D.2d 413 (2d Dept. 2002)].

This Court finds nothing that would render this indictment defective. Accordingly, Defendant’s motion to dismiss the indictment on the grounds that the Grand Jury proceedings were defective is denied.

#### GRAND JURY INSTRUCTIONS AND MINUTES

This Court has also reviewed the instructions given by the Assistant District Attorney to the Grand Jury and finds that the same satisfy the applicable standards [*People v. Calbud, Inc.*,

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49 NY2d 389(1980)]. Accordingly, Defendant's motion to dismiss or reduce the remaining counts of the indictment is denied.

Defendant's motion to be provided with a copy of the Grand Jury minutes is denied in the exercise of discretion. Defendant's motion to be provided with a copy of the legal instructions given to the Grand Jury is also denied in the exercise of discretion.

#### BILL OF PARTICULARS

"The sole function of a bill of particulars is to define more specifically the crime or crimes charged in the indictment, or, in other words, to provide clarification of certain matters set forth in the pleading. A bill of particulars serves to clarify the pleading; it is not a discovery device." [*People v. Davis*, 41 N.Y.2d 678, 679-80 (1977)]. See also *People v. Zurita*, 64 A.D.3d 800, 801 (2d Dept. 2009)]. While a bill of particulars must apprise defendant of the theory to be advanced at trial, there is no requirement that the bill of particulars provide information as to the evidence that will be used to prove that theory. [*People v. Earel*, 220 A.D.2d 899 (3d Dept. 1995), *aff'd* 89 N.Y.2d 960 (1997); *Preisser*, McKinney's Practice Commentaries to CPL §200.95, citing *People v. Fitzgerald*, 45 N.Y.2d 574 (1978)]. Stated differently, "the bill of particulars is meant to provide what the People intend to prove, not show how they intend to do so." [*People v. Young*, 289 A.D.2d 866, 868 (3d Dept. 2001)].

The Court has reviewed the Bill of Particulars and concludes that it provides Defendant with fair notice of the charges against him, adequately appraises Defendant of the theory to be advanced at trial and specifies the substance of Defendant's conduct that the People intend to prove at trial, and contains the information that is necessary for Defendant to adequately prepare and conduct a defense. [*People v. Ribowsky*, 77 N.Y.2d 284, 290 (1991); *People v. Byrnes*, 126 A.D.2d 735, 736 (2d Dept. 1987); *People v. Wideman*, 195 A.D.2d 582, 583 (2d Dept. 1993)].

## DISCOVERY

Defendant's motion for discovery is granted to the extent that the District Attorney is directed to make available to Defendant's attorney any and all property and information required to be disclosed pursuant to CPL 240.20.

Defendant's discovery motion also seeks disclosure of a substantial amount of Rosario and other material that is beyond the scope of CPL §240.20. The People are under no obligation to disclose this material at this stage of the proceedings. Therefore, Defendant's motion seeking production of this material is denied, subject to the People's compliance with their obligations under CPL §240.43 and §240.45, and with their continuing obligations under Brady v. Maryland and its progeny.

However, the search warrant, application and inventory return receipt are discoverable pursuant to CPL §240.20(1)(h). Therefore, unless the People move for a protective order pursuant to CPL §240.50, the People shall provide Defendant's counsel with copies of the search warrant, the warrant application and the inventory return receipt no later than October 20, 2017.

Finally, the People's motion for reciprocal discovery is granted to the extent that Defendant is directed to make available to the People any and all property and information required to be disclosed pursuant to CPL 240.30.

## BRADY AND IMPEACHING MATERIAL

Defendant's motion to be provided with all Brady and impeaching material is granted to the extent that the People shall provide Defendant with any evidence in their possession or control which is favorable to him as provided in Brady v. Maryland, 373 US 83 (1963) and United States v. Bagley, 473 US 667 (1985). The People are reminded of their continuing

obligation pursuant to Brady with respect to the delivery of any materials now in their possession and/or control or which may hereafter come into their possession and/or control or which may tend to exculpate Defendant or which is otherwise favorable to Defendant. This obligation includes any “evidence of a material nature favorable to the defense which, if disclosed, could effect the ultimate decision on a suppression motion.” [People v. Williams, 7 N.Y.3d 15, 19 (2006), quoting People v. Geaslen, 54 N.Y.2d 510 (1981)].

Defendant’s motion for production of exculpatory information also includes a request for information regarding any cooperation agreements that any witnesses have entered into, or may enter into, with the District Attorney’s Office. Any cooperation agreement relating to the testimony that a witness will provide at Defendant’s trial is Brady material. [People v. Steadman, 82 N.Y.2d 1 (1993)]. Therefore, in the event that any such agreement exists or is entered into during the pendency of this matter, the People shall disclose the full terms of that agreement to Defendant sufficiently in advance of the cooperating witness’ testimony so as to provide Defendant with a meaningful opportunity to use the allegedly exculpatory material to cross-examine the cooperating witness. [People v. Leavy, 290 A.D.2d 516 (2d Dept. 2002)].

#### SUPPRESSION OF STATEMENTS

Defendant’s motion to suppress statements alleged to have been made by Defendant as contained in the CPL §710.30 notice served by the People is granted solely to the extent that a Huntley hearing will be held prior to trial [ People v. Huntley, 15 NY2d 72 (1965)]. Defendant’s motion papers also adequately plead a legal basis for suppression as required by CPL §710.60(1). [People v. Frank, 65 A.D.3d 461 (1st Dept. 2009); People v. Moore, 186 A.D.2d 591 (2d Dept.

1992); People v. Huggins, 162 A.D.2d 129 (1st Dept. 1990)]. Those allegations do not permit summary determination of the motion as authorized by CPL §710.60(2) or CPL §710.60(3). Accordingly, Defendant's motion to suppress those statements as the product of an unlawful search and seizure is granted to the extent that a hearing on the motion will take place prior to trial. [Dunaway v. New York, 422 U.S. 200 (1979); People v. Burton, 6 N.Y.3d 584 (2006)].

### PRECLUSION OF STATEMENTS

Defendant also moves for an Order of Preclusion as its relates to any statements by Defendant that the People may attempt to introduce at trial, on the grounds that no timely notice of those statements has been provided as required by CPL §710.30. That statute compels the People to provide Defendant with notice of prior statements made by Defendant when: (1) the People intend to offer those statements at trial; and (2) those statements were made to a public servant; and (3) if made involuntarily, those statements would be suppressible upon motion pursuant to CPL §710.20(3). Pursuant to CPL §710.30(2), this notice must be served within fifteen (15) days of arraignment. If the People fail to serve timely notice of a qualifying statement, the Court is ordinarily required to preclude the statement at trial, regardless of whether the Defendant has been prejudiced by the late notice. [People v. Lopez, 84 NY2d 425, 428 (1994)]. However, the Court may permit the People to serve late notice of a qualifying statement for good cause shown, after providing Defendant with a reasonable opportunity to make a suppression motion. [CPL §710.30(2)].

“The purpose of CPL §710.30 is to provide defendant with an opportunity to challenge the admissibility of inculpatory statements made to law enforcement personnel which the People intend to offer at trial.” [People v. Martinez, 9 AD3d 679, 680 (3d Dept. 2004)]. See also People

v. Lazzaro, 62 AD3d 1035, 1035-36 (3d Dept. 2009)]. However, when a defendant alleges that a CPL §710.30 statement notice was insufficient, no preclusion is necessary if the defendant also moves to suppress that statement. [*Id.* at 680. *See also* People v. O'Doherty, 70 NY2d 479, 483 (1987); People v. Barton, 301 AD2d 747, 748 (3d Dept. 2003)].

Defendant has waived any claimed deficiency in the CPL §710.30 notice relating to the statements that are the subject of the Huntley hearing ordered herein. To the extent that the People seek to offer at trial any statements that Defendant made to law enforcement authorities which are outside the scope of the Huntley hearing, Defendant's motion for preclusion is granted as to only those statements, subject to the limited "good cause shown" exception set forth in CPL §710.30(2). This Order does not preclude the People from using Defendant's statements solely for purposes of impeachment or rebuttal. [People v. Rigo, 273 AD2d 258 (2d Dept. 2000)].

#### SUPPRESSION OF IDENTIFICATION

The People have served a CPL §710.30 notice stating that a witnesses reviewed surveillance video footage that depicted the crimes alleged in the indictment. According to this notice, the witness reviewed that surveillance video on the evening that the charged crimes were committed, and again three days later during his/her Grand Jury testimony.

Defendant moves to prevent the witness from making an in-court identification on the grounds that the review of the surveillance video constituted an unduly suggestive out-of-court identification procedure. That motion is summarily denied because the victim's review of a surveillance video depicting the commission of an armed robbery by a masked perpetrator does

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not constitute an out-of-court identification procedure. [People v. Gee, 99 N.Y.2d 158, 162 (2002) People v. Lara, 130 A.D.3d 463, 464 (1st Dept. 2015); People v. Justice, 127 A.D.3d 786, 786 (2d Dept. 2015)].

#### SUPPRESSION OF PHYSICAL EVIDENCE

Defendant moves to suppress all physical evidence that was seized in this case. However, the People have not yet disclosed copies of the search warrant application and the inventory return receipt. Once the People disclose those documents, Defendant is granted leave to renew his motion to suppress physical evidence. Defendant shall file this motion with the Court no later than two weeks after receiving copies of the search warrant application and the inventory return receipt.

#### SANDOVAL

The Court grants Defendant's motion for a Sandoval hearing to the extent that a hearing is ordered which will be held immediately prior to trial to determine which, if any, bad acts or convictions may be used as impeachment in the event that the Defendant elects to testify at trial. See People v. Sandoval, 34 NY2d 371 (1974). The District Attorney has provided Defendant's attorney with a true copy of Defendant's Division of Criminal Justice Services Summary Case History. The Court orders the District Attorney to disclose to Defendant's attorney any and all acts upon which it intends to impeach Defendant, including without limitation all prior instances of Defendant's alleged prior uncharged criminal, vicious or immoral conduct that the People intend to use at trial for the purposes of impeaching Defendant's credibility. [CPL §240.43].

### VENTIMIGLIA

Defendant has requested that the People to supply Defendant with notice of all specific instances of prior uncharged conduct which the People will seek to offer against Defendant at trial upon its direct case.

The People have not made any application to offer evidence of any specific instances of uncharged crimes which they intend to offer in their direct case pursuant to People v Ventimiglia, 52 N.Y.2d 350 (1981). If the People intend to make an application pursuant to People v Ventimiglia, they should do so prior to the Sandoval hearing ordered herein.

### SEVERANCE

Defense counsel indicates that the attorneys have had preliminary conversations about a potential motion to sever Defendant's trial from that of his co-defendant. Defense counsel also indicates that he and the other attorneys agree that this motion would be premature at this point. Therefore, defense counsel seeks leave to move for severance at a later point in this proceeding.

This case is still in the early pretrial stages. Pretrial hearings will clarify the admissibility of any statements that the People claim that Defendant and his co-defendant made to law enforcement. Any Sandoval or Ventimiglia ruling that the Court may make will also add clarity to these proceedings. The Court also anticipates that Defendant and his co-defendant will not settle on theories of defense until after discovery is completed, pretrial motions are adjudicated, and defense counsel has conducted additional investigation. Accordingly, Defendant's motion for leave to move for severance at a later point in this proceeding is granted.

LEAVE TO FILE ADDITIONAL MOTIONS


Defendant's request for leave to file additional motions is granted to the extent that Defendant is granted leave to file a motion for severance at a time to be identified by the Court.

Defendant's request for leave to file additional motions is also granted to the extent that Defendant may file a supplemental motion for the suppression of physical evidence on the grounds that it is the product of an unlawful search and seizure no later than two weeks after the People disclose the search warrant, search warrant application and inventory return receipt as ordered herein.

Leave to file additional motions beyond the statutory 45-day time limit will only be granted upon an application that meets the requirements of CPL §255.20(3).

So Ordered.

Dated: Poughkeepsie, NY  
October 13, 2017

  
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PETER M. FORMAN  
COUNTY COURT JUDGE

TO: WILLIAM V. GRADY, ESQ.  
Dutchess County District Attorney  
Frank R. Petramale, Esq.  
236 Main Street  
Poughkeepsie, New York 12601

Thomas K. Petro, Esq.  
Attorney for Defendant Johnny White, Jr.  
71 Maiden Lane  
Kingston, NY 12401