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| <b>People v Kett</b>   |
| 2017 NY Slip Op 33188(U)   |
| December 20, 2017  |
| County Court, Dutchess County  |
| Docket Number: 74/2017   |
| Judge: Peter M. Forman   |
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1389-2017

DUTCHESS COUNTY  
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STATE OF NEW YORK: COUNTY OF DUTCHESS  
COUNTY COURT

2017 DEC 27 PH 4: 04

THE PEOPLE OF THE STATE OF NEW YORK,

DECISION AND ORDER  
Ind. No. 74/2017

Plaintiff,

William V. Grady,  
District Attorney  
By: David A. Kunca, Esq.

- against -

Mikael Cohn, Esq.  
Counsel for Defendant

SHANNON KETT, TIMOTHY ROBINSON,  
DOLORES WALDRON and CARLOS BUCHANAN,

Defendant.

HON. PETER M. FORMAN, County Court Judge

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

PAPERS NUMBERED

|                               |   |
|-------------------------------|---|
| NOTICE OF OMNIBUS MOTION..... | 1 |
| AFFIRMATION IN SUPPORT.....   | 2 |
| ANSWERING AFFIRMATION.....    | 3 |

Defendant stands accused by the Grand Jury of the County of Dutchess of one count of Criminal Sale of a Controlled Substance in the Third Degree, a Class B Felony, in violation of §220.39(1) of the Penal Law; three counts of Criminal Possession of a Controlled Substance in the Third Degree, a Class B Felony, in violation of §220.16(1) of the Penal Law; one count of Criminal Possession of a Controlled Substance in the Third Degree, a Class B Felony, in violation of §220.16(12) of the Penal Law; and one count of Criminally Using Drug Paraphernalia in the Second Degree, a Class A Misdemeanor, in violation of §220.50(3) of the Penal Law.

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By Omnibus Motion, Defendant seeks various forms of relief of which this Court will address as follows:

#### LEGAL SUFFICIENCY OF THE INDICTMENT

With respect to Defendant's motion for inspection of the Grand Jury minutes and dismissal or reduction of the superseding 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 presented, 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 superseding 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.*, 49 NY2d 389(1980)]. Accordingly, Defendant's motion to dismiss or reduce 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.

## DISCOVERY

Defendant's motion for discovery is granted solely 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 substantial amounts of material that are beyond the scope of CPL §240.20, including without limitation police reports. The People are under no obligation to disclose these materials 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.

The search warrant, 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 these documents no later than January 11, 2018.

## PRECLUSION OF STATEMENTS

Defendant moves for an Order of Preclusion as it 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 N.Y.2d 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 A.D.3d 679, 680 (3d Dept. 2004). *See also* *People v. Lazzaro*, 62 A.D.3d 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 N.Y.2d 479, 483 (1987); *People v. Barton*, 301 A.D.2d 747, 748 (3d Dept. 2003)].

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The People have not served a CPL §710.30 notice identifying any statements by Defendant that the People intend to introduce at trial. Therefore, Defendant's motion for preclusion is granted, 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 A.D.2d 258 (2d Dept. 2000)].

#### PRECLUSION OF IDENTIFICATION TESTIMONY

Defendant moves for an order of preclusion as it relates to any out-of-court identification procedures, on the grounds that no notice has been provided of any such procedures as required by CPL §710.30.

CPL §710.30 compels the People to provide Defendant with notice of their intent to introduce identification testimony at trial by a witness who previously identified the Defendant. Pursuant to CPL §710.30(2), this notice must be served within fifteen (15) days of arraignment. If the People fail to timely serve that notice, the Court is ordinarily required to preclude that identification testimony at trial, regardless of whether the Defendant has been prejudiced by the late notice. [*People v. Lopez*, 84 N.Y.2d 425, 428 (1994)]. However, the Court may permit the People to serve late notice of a qualifying out-of-court identification procedure for good cause shown, after providing Defendant with a reasonable opportunity to make a suppression motion. [CPL §710.30(2)].

The People have not served a CPL §710.30 notice identifying any out-of-court identification procedure arranged by a law enforcement authority. Therefore, Defendant's motion for preclusion is granted as to any witness who has previously identified Defendant in an out-of-

[\* 7]

court identification procedure, if any, subject to the limited “good cause shown” exception set forth in CPL §710.30(2).

### 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)].

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)]. The People shall disclose the full terms of any cooperation agreement that exists, if any, sufficiently in advance of the confidential informant’s testimony so as to provide Defendant with a meaningful opportunity to use the allegedly exculpatory material to cross-examine that witness. [People v. Leavy, 290 A.D.2d 516 (2d Dept. 2002)]. This disclosure must be made no later than the time provided by CPL §240.45(1) for the disclosure of the criminal history of any witnesses that the People intend to call at trial.

## 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 three 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.

#### PRE-TRIAL HEARINGS

Defendant's request that any pre-trial hearings be conducted at least twenty (20) days prior to trial is denied. All pre-trial hearings will be scheduled at the convenience of the Court and the parties herein, and transcripts will be made available to the defense prior to the commencement of trial testimony.

#### CPL 216 HEARING

Defendant has requested a hearing on the issue of whether she should be offered alcohol or substance abuse treatment pursuant to Article 216 of the Criminal Procedure Law. The application for a hearing is granted pursuant to CPL 216.05(3).

#### LEAVE TO FILE ADDITIONAL MOTIONS

Defendant's request for leave to file additional motions is 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 three weeks after the People disclose the search warrant, search warrant application and inventory return receipt as ordered herein.

Leave to file any additional motions will only be granted upon an application that meets the requirements of CPL §255.20(3).

So Ordered.

Dated: Poughkeepsie, NY  
December 20, 2017

  
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**PETER M. FORMAN**  
**COUNTY COURT JUDGE**

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