

**People v Holmes**

2017 NY Slip Op 33210(U)

May 29, 2017

County Court, Orange County

Docket Number: 2166-2017

Judge: Craig Stephen Brown

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.

STATE OF NEW YORK  
COUNTY COURT : ORANGE COUNTY

-----X  
PEOPLE OF THE STATE OF NEW YORK,

DECISION & ORDER

-against-

Ind No. 2017-185  
Index #2166-2017

THOMAS HOLMES,

Defendant.

-----X  
**CRAIG STEPHEN BROWN, Judge.**

UPON reading and filing the within Omnibus Motion dated May 11, 2017, submitted by Brandon C. Ozman, Esq., attorney for the defendant, the Affirmation in Response of R. Alexander McManus, Esq., Assistant District Attorney for the County of Orange, dated May 17, 2017, the Voluntary Disclosure Form, the Grand Jury minutes, and upon all the papers and proceedings had herein, it is hereby Ordered that the defendant's motion is decided as follows:

**MOTION FOR A BILL OF PARTICULARS (PARAGRAPH 6)**

The request for information as set forth in paragraphs numbered "a" and "c" (conduct) in the defendant's moving papers is denied on the basis that it was previously provided in the Voluntary Disclosure Form.

The request for information as set forth in paragraphs numbered "b", "d" (witnesses), "e" and "f" is denied.

The request for information as set forth in paragraphs numbered "g" (provide tape), "h" and "i" is granted. The People are Ordered to provide the aforesaid information within ten (10) days from the date of this Order.

**MOTION FOR DISCOVERY AND INSPECTION (PARAGRAPH 10)**

The request for information as set forth in paragraph numbered "j" is denied based upon

[\* 2]  
the representation by the District Attorney that no such information exists.

The request for information as set forth in paragraphs numbered is “a”, “b”, “c”, “e”, “f”, “g”, “h”, “i”, “k”, “m” and “p” is denied.

The request for information as set forth in paragraphs numbered “d” (if possessed by defendant), “l”, “n”, “o” (list) and “q” (list) is granted. The People are Ordered to provide the aforesaid information within ten (10) days from the date of this Order.

### **MOTION FOR PRECLUSION**

Defendant's Motion to Preclude the introduction of testimony, at trial, of statements made by defendant and/or of identification evidence which were not set forth in the District Attorney's CPL §710.30 Notice is denied with leave to renew at trial in the event that the District Attorney seeks to introduce such evidence.

### **MOTION TO SUPPRESS PHYSICAL EVIDENCE**

The Motion is granted to the extent that a Hearing is hereby Ordered pursuant to CPL§710.60(4) to determine the admissibility of physical evidence allegedly obtained from defendant.

### **MOTION PURSUANT TO *BRADY V. MARYLAND***

Defendant's Motion is granted to the extent that it is hereby Ordered that the District Attorney provide defendant with any and all documents and materials as required under *Brady v. Maryland*.

### **MOTION TO SUPPRESS STATEMENTS**

The Motion is granted to the extent that a Hearing is hereby Ordered pursuant to CPL §710.60(4) to determine the admissibility of statements allegedly made by the defendant.

### **MOTION TO CHEMICAL TEST RESULTS**

The Motion is granted to the extent that a Hearing is hereby Ordered pursuant to CPL §710.60(4) to determine the admissibility of any chemical test result to be offered at trial.

### **MOTION TO SUPPRESS EVIDENCE OF PHYSIOLOGICAL OR PERFORMANCE TESTS**

The defendant's motion to suppress evidence of physiological or performance tests is denied with leave to renew at the conclusion of the Pre-Trial Hearing.

### **MOTION FOR A SANDOVAL HEARING**

The Motion is granted to the extent that a Hearing is hereby 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. The Court further Orders the District Attorney to provide defendant's attorney with true copy of defendant's DCJS Summary Case History and to disclose to defendant's attorney any and all acts about which it intends to use as impeachment. The above information must be provided to defendant's attorney at least three days, excluding Saturdays, Sundays and holidays prior to the commencement of jury selection.

### **MOTION PURSUANT TO VENTIMIGLIA**

Defendant's motion for relief pursuant to *People v Ventimiglia*, (52 NY2d 350) is denied with leave to renew in the event that the District Attorney seeks to introduce evidence at trial of defendant's prior bad acts or convictions.

### **MOTION TO INSPECT GRAND JURY MINUTES**

The Court has reviewed the minutes of the Grand Jury and notes that the Assistant District Attorney failed to elicit legally sufficient evidence with respect to defendant's

performance on certain field sobriety tests administered to him by the arresting officer. When the District Attorney asked the witness to state his observations of defendant's performance of the Horizontal Gaze Nystagmus Test, the witness stated "He displayed six out of six clues during HGN [which indicated] that he was intoxicated" (Grand Jury Transcript, page 8, line 23 - page 9, line 5). When the District Attorney asked the witness to state his observations of defendant's performance on the walk-and-turn test, the witness stated "He displayed five out of the eight clues . . . That indicates a fail" (Grand Jury Transcript, page 9, lines 17-21). When the District Attorney asked the witness to describe defendant's performance on the one-leg-stand test, the witness stated "He displayed three out of the four . . . and (t)hat would be a fail" (Grand Jury Transcript, page 10, lines 9-16).

It is well-settled law in the State of New York and in American jurisprudence that lay witnesses must testify to facts, not opinions or conclusions drawn from the facts (See, *People v Russell*, 165 AD2d 327, *affd.* 79 NY2d 1024). It is within the province of the Grand Jury to draw the necessary inferences from facts relating to the manner in which defendant performed the field sobriety tests administered to him. Although there are exceptions permitting a lay witness to state an opinion based on his or her perception, before such opinions are admissible, the witness must state the facts and circumstances on which the opinion is based (See, *People v Patterson*, 149 Ad2d 966, *app. disp.* 74 NY2d 745). *People v Smith*, 162 AD2d 999, *app. Dism.* 76 NY2d 896). Here, the District Attorney did not ask the witness to set forth *any* facts which formed the basis of the witness's opinion that defendant "failed" the field sobriety tests. The District Attorney is reminded of its obligation to introduce evidence of facts to enable the Court to determine whether there is a legal basis to support the charges presented to the Grand Jury.

Notwithstanding the District Attorney's error, the Court finds that the integrity of the

Grand Jury presentation was not impaired because there was sufficient independent evidence to support the Indictment. The Court further finds that the Grand jury was properly instructed with respect to the applicable law.

**MOTION TO DISMISS IN FURTHERANCE OF JUSTICE**

The defendant's motion to dismiss in furtherance of justice is denied on the ground that there has been no showing of a compelling factor to dismiss the serious charges against the defendant.

**HEARINGS IN ADVANCE OF TRIAL**

The defendant's motion for the scheduling of Pre-Trial Hearing a minimum number of days prior to trial is denied with leave to renew at Trial.

**ADJOURNED DATE**

This matter is scheduled for a conference to be held on May 30, 2017, at 9:15 A.M. The defendant and defendant's counsel and District Attorney are directed to be present.

The aforesaid constitutes the Decision and Order of the Court.

Dated: May 29, 2017  
Goshen, New York

ENTER

  
\_\_\_\_\_  
HON. CRAIG STEPHEN BROWN  
COUNTY COURT JUDGE

TO: OZMAN LAW OFFICES  
Attorney for Defendant  
130 West Main Street  
Walden, New York 12586

ORANGE COUNTY DISTRICT ATTORNEY  
Attorney for the People  
40 Matthews Street  
Goshen, New York 10924