

<b>People v Plochorczyk</b>
2017 NY Slip Op 33281(U)
July 31, 2017
County Court, Orange County
Docket Number: 2017-374
Judge: Craig Stephen Brown
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 ORIGINAL

STATE OF NEW YORK  
 COUNTY COURT : ORANGE COUNTY

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 PEOPLE OF THE STATE OF NEW YORK,

DECISION & ORDER

-against-

' Ind No. 2017-374  
 Index #3920/2017

JOSHUA PLOCHORCZYK,

Defendant.

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

UPON reading and filing the within Omnibus Motion dated July 5, 2017, submitted by James E. Monroe, Esq. of Dupee & Monroe, P.C. attorney for the defendant, the Affirmation in Response of Theresa Cayton, Esq., Assistant District Attorney for the County of Orange, dated July 11, 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 TO INSPECT GRAND JURY MINUTES**

Defendant is charged with, *inter. alia.*, Aggravated Operation of a Motor Vehicle While Under the Influence of Alcohol, as a Felony, allegedly occurring on December 11, 2016.

The Court has reviewed the transcript of the Grand Jury testimony and notes that the Assistant District Attorney failed to elicit legally sufficient evidence with respect to defendant's performance on the field sobriety tests administered to him by the arresting officer. The District Attorney asked the officer whether his observation of defendant's performance of the Gaze Nystagmus Test indicated a pass or fail. The officer responded "A fail" (See, Grand Jury Transcript, page 9, line 24 to page 10, line 2). The Assistant District Attorney then asked what observations the police officer made on the walk and turn test. The police officer responded "He

failed” (See, Grand Jury Transcript, page 10, lines 3-13). The Assistant District Attorney then asked what observations the police officer made on the finger to nose test. The officer responded “It was a fail” (See, Grand Jury Transcript, page 10, line 24 to page 11, line 13).

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. disp.*, 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 FOR A BILL OF PARTICULARS (PARAGRAPH 14)**

The request for information as set forth in paragraphs numbered “a”, “c” and “d” 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 "o", "q", "r" and "ll" is denied based upon the representation by the District Attorney that no such information exists.

The request for information as set forth in paragraphs numbered "b", "h", "j", "k", "m", "n" and "p" is denied.

The request for information as set forth in paragraphs numbered "e", "f", "g", "i", "l" and "s" 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 22)**

The request for information as set forth in paragraphs numbered "a", "d" and "i" 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 paragraph numbered "ss" is denied based upon the representation by the District Attorney that no such information exists.

The request for information as set forth in paragraphs numbered "c", "e", "g", "j", "k", "m", "p", "q", "s", "t", "u", "v", "w", "x", "y", "z", "aa", "bb", "dd", "ee", "ff", "gg", "hh", "jj", "kk", "oo", "pp", "rr", "tt", "uu", "vv" and "xx" is denied.

The request for information as set forth in paragraphs numbered "b", "f", "h", "l", "n", "o", "r", "cc", "ii", "mm", "nn", "qq", "ww" and "yy" is granted. The People are Ordered to provide the aforesaid information within ten (10) days from the date of this Order.

#### **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

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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 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 FOR PROBABLE CAUSE HEARING**

The defendant's request for a "probable cause" hearing is denied. Any proof that the police lacked probable cause to question or arrest defendant or to obtain physical evidence from him may be presented during the pre-trial hearing to determine the admissibility of the defendant's admissions , chemical test results or physical evidence.

#### **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 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.

**ADJOURNED DATE**

This matter is scheduled for a conference to be held on July 31, 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: July 31, 2017  
Goshen, New York

ENTER

  
HON. CRAIG STEPHEN BROWN  
COUNTY COURT JUDGE

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