

<b>People v Mordan-Veras</b>
2018 NY Slip Op 33519(U)
June 7, 2017
County Court, Westchester County
Docket Number: 16-1355-02
Judge: Barbara G. Zambelli
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

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

- against -

CRISTIAN DIAZ ARVELO and  
**WLADIMIR MORDAN-VERAS,**

Defendants.

JUN 07 2017

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

DECISION & ORDER

Indictment No.: 16-1355-02

-----X  
ZAMBELLI, J.

The defendant is charged as aiding and abetting and acting in concert with his co-defendant for allegedly committing the crimes of scheme to defraud in the first degree, criminal possession of a forged instrument in the second degree (14 counts), and criminal possession of stolen property in the fourth degree allegedly committed on or about July 16, 2016 in the county of Westchester. Defendant is further individually indicted for identity theft in the second degree (2 counts), attempted grand larceny in the fourth degree, grand larceny in the fourth degree and criminal possession of a forged instrument in the second degree (2 counts)1 allegedly committed on or about July 16, 2016 in the County of Westchester. He now moves by notice of motion with supporting affirmation and memorandum of law for omnibus relief. The People's response consists of an affidavit 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. INSPECT / DISMISS / REDUCE

The 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 of the indictment were supported by sufficient evidence and that the instructions given were appropriate. There was no other infirmity which would warrant a dismissal of the instant 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]).

## 2. MOTION FOR DISCOVERY AND INSPECTION / BRADY/ GIGLIO MATERIAL

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. 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]).

The People are reminded of the continuing obligation to provide exculpatory information to the defendant (Brady v. Maryland, 373 U.S. 83). Exculpatory information includes any information that would be "favorable to the defense, material either to guilt or punishment, or affecting the credibility of prosecution witnesses," (People v. Baxley, 84 NY2d 208, 213). The People are directed to disclose any such information to the defense. 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. To the extent that defendant seeks disclosure of agreements between the People and witnesses, the application is granted upon the People's acknowledgment of their duty to disclose same (Giglio v United States, 405 US 150).

3. MOTION TO SEVER

Defendant argues that he will be unduly prejudiced if he is tried jointly with his co-defendant because he submits that he and his co-defendant have antagonistic defenses and there will be Bruton issues. Defendant bases his motion on the fact that the co-defendant initially stated that defendant had purchased a laptop in Best Buy, but then changed his statement to state that he purchased the laptop in Best Buy. The People oppose the motion and argue that the charges were properly joined as all being part of the same criminal transaction. They also argue that defendant's motion is premature.

The defendant's claims are conclusory and do not rise to the level of the compelling reasons required to mandate severance at this time (see People v. Mahboubian, 74 NY2d 174). Defendant's motion is denied with leave to renew before the trial judge.

4. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL / 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 NY2d 118, 121-122). In the event the People seek to introduce 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 NY2d 350).

5. MOTION TO SUPPRESS STATEMENT

The People have served the defendant with one CPL §710.30 notice regarding an oral statement. The defendant moves to suppress the noticed statement on the ground that it was involuntarily made while in custody without Miranda warnings and was taken in violation of his right to counsel.

The People oppose the defendant's motion and argue that defendant's statement was voluntarily made by him when he was not in custody in response to preliminary investigative questions designed to clarify the nature of the situation confronted for which Miranda warnings were not required.

Defendant's motion is granted to the extent that the Court will conduct a hearing prior to trial to determine whether Miranda warnings were necessary and, if so, whether the defendant was so advised and made a knowing, intelligent and voluntary waiver thereof, or whether the statements were otherwise involuntarily made within the meaning of CPL §60.45.

6. MOTION TO PRECLUDE UNNOTICED IDENTIFICATIONS AND STATEMENTS

The defendant moves in advance to preclude the People from introducing any identifications and statements at trial which were not noticed to him pursuant to CPL §710.30. Defendant does not allege that the People have actually served any such notices outside of the statutory time frame. The defendant's motion is therefore denied as moot with leave to renew in the event that the People seek to serve such notices in the future.

7. MOTION TO SUPPRESS PHYSICAL EVIDENCE /  
CONTROVERT SEARCH WARRANT

Defendant seeks suppression of physical evidence recovered in this case on the grounds that the vehicle in which he was a passenger was illegally searched and he was illegally seized and searched by the police officers who were acting without a warrant, consent or reasonable suspicion or probable cause that he had committed a crime. Defendant submits that he was a passenger in the back seat of the vehicle and was committing no crime when he was arrested by the police and alleges that his status as a passenger confers standing upon him to challenge the search of the vehicle. Defendant further argues that the police only had reasonable suspicion to stop the vehicle and not probable cause to search it, as at the time of the stop, the police just had suspicion that criminal activity was afoot. He argues that the evidence seized from the car was improperly used to justify probable cause for their arrests. He also denies that there was any evidence in plain view, and disputes that this was a valid inventory search.

As to the search warrant issued for his cell phone (which warrant and affidavit have been produced to the defense), defendant argues that the warrant lacks probable cause because there is an insufficient nexus between his phone and the alleged crimes to justify a search thereof. He submits that the fact that he left the store while talking on his cell phone did not justify the issuance of the warrant. He also argues that the warrant was the fruit of the poisonous tree of the alleged illegal search of the vehicle.

The People oppose the motion and argue that the co-defendant's vehicle was properly stopped because a license plate check revealed that the registration was suspended and because defendant failed to signal while turning. They also argue that

probable cause existed for defendant's arrest because the police received a complaint from an identified citizen, the loss prevention officer of Best Buy, that co-defendant was involved in a fraudulent transaction. They submit that when the police arrived on the scene and conducted surveillance, they observed co-defendant getting in and out of his vehicle and taking pictures of merchandise with his cell phone. The People argue that, at the same time, they received another call from the loss prevention officer regarding defendant, who had been in the store allegedly attempting to make another fraudulent purchase while speaking on his cell phone during the entire transaction, which transaction was also suspected by store staff to be fraudulent, and when defendant was told that a voice check was necessary, he rapidly left the store, where he was observed by the police running from the store (while still on his cell phone) and diving into the backseat of co-defendant's vehicle and that they attempted to flee. The People submit that a license plate check revealed that the vehicle's registration was suspended for lack of insurance and that upon following the vehicle, the police observed the co-defendant fail to signal while making a turn, which provided probable cause to stop the vehicle. Upon stopping the vehicle and approaching it, the People submit that the police observed defendant lunging toward the front seat and handing co-defendant something, who appeared to be hiding it and observed co-defendant touching the steering column and dashboard. The People submit that the police asked defendant and co-defendant preliminary investigative questions designed to clarify the nature of the situation confronted (the noticed statements), and contend that co-defendant's statements were inconsistent in that he initially denied entering Best Buy but then admitted that he had bought a laptop there. The People submit that after the two men had been separated, the police observed what appeared to be a

plastic card wedged into the steering column, which upon inspection, was revealed to be a fraudulent Bank of America card, and upon further manipulation of the steering column, another fraudulent Bank of America card fell out, as well as a New Jersey state ID card in the name of Sam Datzman, but bearing co-defendant's photo. They argue that in a hollow space under the dash behind the steering column, the police discovered photocopies of banking information and social security cards, forged social security cards, forged driver's licenses bearing defendant and co-defendant's photos and fraudulent credit cards. They therefore submit that probable cause existed for defendant's arrest.

As to the evidence recovered, the People dispute that defendant has standing to challenge the recovery of evidence from the vehicle, as they submit that the vehicle is not defendant's and is registered to another individual. They argue that the vehicle was properly searched pursuant to the automobile exception, and that the credit card in the steering column was in plain view. They further argue that in any event, because defendant and co-defendant were arrested and because the vehicle had a suspended registration, it needed to be impounded and an inventory search would have been proper under the circumstances. They also argue that any evidence recovered from defendant's person, including his cell phone, was properly acquired pursuant to a search incident to defendant's arrest. As to the search warrant issued (which warrant and affidavit were provided to the defense in consent discovery), the People contend that the warrant affidavit contains probable cause on its face and argue that defendant lacks standing to challenge the recovery of any evidence from the co-defendant's phone.

The defendant's motion is granted to the extent that a pre-trial hearing will be held to determine whether property seized subsequent to the stop and seizure of defendant's

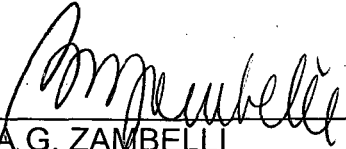
person should be excluded as the product of an unlawful seizure or other violation of the defendant's rights, including whether defendant has standing to contest the seizure of the evidence recovered from the vehicle (Mapp v. United States, 367 US 642; People v. Holmes, 81 NY2d 1056; People v. Selby, 220 AD2d 544). To the extent that defendant challenges the search warrant issued for his cell phone, upon the review of the four corners of the search warrant affidavit, which has been provided to the defendant, the Court finds that the warrant was supported by probable cause (see People v. Keyes, 291 AD2d 571 (2d Dept. 2002)). Contrary to defendant's allegations, the affidavit contains a sufficient nexus between the alleged crimes and defendant's phone to justify the issuance of the warrant, as aside from the facts regarding the alleged fraudulent transactions, defendant was specifically alleged to have been on his cell phone in the store the entire time that he was attempting to purchase a television with alleged fraudulent documentation and the co-defendant was alleged to be on his phone at approximately the same time and had been seen taking photographs of items in the trunk of the vehicle with his cell phone, which facts gave rise to probable cause to believe that evidence relating to the crimes would be found on defendant's phone. To the extent defendant challenges the recovery of evidence from his co-defendant's phone, he lacks standing to do so. However, the issue as to whether the warrant is the fruit of the poisonous tree of the search of the vehicle must await the outcome of the hearing on that motion.

#### 8. MOTION TO STRIKE ALIBI DEMAND

This motion is denied. There is no merit to the defendant's contention that CPL §250.20 is unconstitutional (see People v. Dawson, 185 AD2d 854; People v. Cruz, 176 AD2d 751; People v. Gil, 164 AD2d 867; People v. Peterson, 96 AD2d 871).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York  
June , 2017

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

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

Deveraux Cannick, Esq.  
Attorney for Defendant Cristian Diaz Arvelo  
Aiello & Cannick  
69-06 Grand Avenue  
Maspeth, New York 11378

Michael P. Rubin, Esq.  
Attorney for Defendant Wladimir Mordan-Veras  
Mancuso Rubin & Fufidio  
One North Broadway - Suite 800  
White Plains, New York 10601

Lakisha C. Hickson  
Chief Clerk