| **People v Hood** |
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| 2018 NY Slip Op 33754(U) |
| July 30, 2018 |
| County Court, Westchester County |
| Docket Number: 17-1095 |
| Judge: Anne E. Minihan |
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FILED
AND ENTERED
ON 7-30-2018
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Ind No.: 17-1095

NAJIB HOOD

FILED
JUL 31 2018
T.W. C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant.

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MINIHAN, A.

Defendant, NAJIB HOOD, by Westchester County Indictment No. 17-1095, is charged with Burglary in the Second Degree (Penal Law § 140.25[2]), Attempted Burglary in the Second Degree (Penal Law § § 110/140.25[2]), and Criminal Mischief in the Fourth Degree (Penal Law § 145.00[1]) (two counts), and has filed an omnibus motion consisting of a Notice of Motion and an Affirmation in Support. In response thereto, the People have filed an Affirmation in Opposition together with a Memorandum of Law.

Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order dated May 8, 2018, entered in this case, this Court disposes of this motion as follows:

A.

MOTION to INSPECT and to DISMISS and/or REDUCE
CPL ARTICLE 190

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment.

The defendant, who bears the burden of refuting with substantial evidence the presumption of regularity which attaches to official court proceedings (*People v Pichardo*, 168 AD2d 577 2d Dept 1990]), has offered no sworn factual allegations, in support of his argument that the grand jury proceedings were defective. The minutes reveal a quorum of the grand jurors was present during the presentation of evidence, and that the Assistant District Attorney properly instructed the grand jury on the law, and only permitted those grand jurors who heard all the evidence to vote the matter (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

The evidence presented to the grand jury, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]). "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction" (*People v Mills*, 1 NY3d 269, 274-275 [2002]). Legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof (CPL 70.10[1]; *see People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]).

Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

B.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress physical evidence on the ground that the police lacked probable cause for his arrest. To support that claim, defendant argues that the police have not shown that any evidence seized from his person at the time of arrest links him to any crime. Defendant offers no sworn allegations of fact in support of his conclusory claim of illegal seizure or arrest (*see* CPL 710.60[1]). Thus, the branch of defendant's motion which seeks to suppress any physical evidence seized from his person is summarily denied (*see People v France*, 12 NY3d 790 [2009]; *People v Jones*, 95 NY2d 721 [2001]; *People v Anderson*, 253 AD2d 636 [1st Dept 1998]; CPL 710.60[3][b]; *see also People v Scully*, 14 NY3d 861 [2010]).

Notwithstanding, this branch of defendant's motion is granted solely to the extent of conducting a hearing to address whether defendant had a reasonable expectation of privacy as to any of the locations searched to constitute standing to challenge the seizure of any physical evidence, i.e., the shorts found in the yard (*see Rakas v Illinois*, 439 US 128 [1978]; *People v Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v Ponder*, 54 NY2d 160 [1981]; *People v White*, 153 AD3d 1369 [2d Dept 2017]; *People v Hawkins*, 262 AD2d 423 [2d Dept 1999]). If it is

determined that defendant has standing then a *Mapp/Dunaway* hearing will be conducted prior to trial to determine the propriety of any search resulting in the seizure of property (*Mapp v Ohio*, 367 US 643 [1961]). The hearing will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

C.

MOTION to SUPPRESS NOTICED STATEMENTS

This branch of defendant's motion seeking to suppress statements allegedly made by him on the grounds that they were unconstitutionally obtained is granted only to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by defendant, which have been noticed by the People pursuant to CPL 710.30, were involuntarily made within the meaning of CPL 60.45 (*see* CPL 710.20(3); CPL 710.60[3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of defendant's Sixth Amendment right to counsel, and/or obtained in violation of defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

D.

MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

Defendant's motion is granted to the limited extent of conducting a hearing prior to trial to determine whether the identifying witnesses had a sufficient prior familiarity with the defendant as to render them impervious to police suggestion (*People v Rodriguez*, 79 NY 2d 445 [1992]). If the court finds that there was not a sufficient prior familiarity with the defendant on the part of a witness, the court will then consider whether or not the noticed identification was unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identification was so improperly suggestive as to taint any in-court identification. If an identification is found to be unduly suggestive, the court shall then consider whether the People have proven by clear and convincing evidence that an independent source exists for such witness' proposed in-court identification.

E.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions,

prior uncharged criminal, vicious or immoral conduct. The People have consented to a *Sandoval* hearing. Accordingly, it is ordered that immediately prior to trial a hearing shall be conducted pursuant to *People v Sandoval* (34 NY2d 371[1974]). At said hearing, the People shall be required to notify the defendant of all specific instances of his criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach the defendant's credibility if he elects to testify at trial (CPL 240.43).

At the hearing, the defendant shall bear the burden of identifying any instances of his prior misconduct that he submits the People should not be permitted to use to impeach his credibility. The defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

To the extent defendant's application is for a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), it is denied since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of the defendant during its case in chief (*see People v Molineaux*, 168 NY 264 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
July 30, 2018

Honorable Anne E. Minihan
Acting Supreme Court Justice

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